89-242

No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

R. EUGENE PINCHAM,

Petitioner,

vs.

THE ILLINOIS JUDICIAL INQUIRY BOARD AND ITS MEMBERS, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER, UNDER THE *YOUNGER v. HARRIS* (1971), 401 U.S. 37, ABSTENTION DOCTRINE, AND UNDER MORE RECENT *NEW ORLEANS PUBLIC SERVICE, INC. v. COUNCIL OF THE CITY OF NEW ORLEANS*, (6/19/89), NO. 88-348. 49 CCH S.CT. BULL. P. B3363-3391, THE DISTRICT COURT, IN WHICH PETITIONER, A JUSTICE OF THE APPELLATE COURT OF ILLINOIS, SOUGHT DECLARATORY AND INJUNCTIVE RELIEF, IMPROPERLY ABSTAINED FROM EXERCISING JURISDICTION AND ERRONEOUSLY REFUSED TO PROTECT AND ENFORCE PETITIONER'S CONSTITUTIONAL RIGHTS TO FREE POLITICAL SPEECH, EQUAL PROTECTION AND DUE PROCESS,

when the sole basis for Petitioner's alleged illegal "political activity", in disciplinary proceedings against Petitioner before the Illinois Courts Commission, was a hyperbolic statement in Petitioner's speech on Black History in America, in commemoration of Black History Month, at a weekly community town hall meeting; and,

where under the Illinois Constitution and the decisions of the Illinois Supreme Court, the Illinois Courts Commission lacked jurisdiction to interpret, enforce or protect Petitioner's said constitutional rights; and,

where under the Illinois Constitution any disciplinary decision against Petitioner by the Illinois Courts Commission is final and non-appealable; and,

where the District Court was the only forum in which Petitioner's constitutionally protected rights of free political speech, due process, equal protection could be invoked, interpreted, enforced and protected?

2. WHETHER THE DISCIPLINARY PROCEEDINGS AGAINST PETITIONER WERE HARASSMENT, IN BAD

FAITH, AND SELECTIVE PROSECUTION, VIOLATIVE OF CONSTITUTIONAL EQUAL PROTECTION WHICH PRECLUDED ABSTENTION AND WARRANTED FEDERAL INTERVENTION?

3. WHETHER THE ILLINOIS SUPREME COURT RULES, WHEN APPLIED TO PETITIONER'S STATEMENT IN HIS SPEECH, VIOLATE CONSTITUTIONAL FREE SPEECH AND DUE PROCESS BECAUSE OF VAGUENESS AND LACK OF SPECIFICITY, PRECLUDED ABSTENTION, AND WARRANTED FEDERAL INTERVENTION?

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PRAYER

Petitioner, R. Eugene Pincham, respectfully prays that a Writ of Certiorari issue to review and reverse the judgment and order of the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court's abstention and dismissal of Plaintiff's complaint for declaratory and injunctive relief.

OPINIONS BELOW

The judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, was entered March 4, 1988, appears in 681 F. Supp. 1309, and is attached hereto as Appendix A. The order and judgment of the United States Court of Appeals for the

Seventh Circuit was entered April 27, 1989, appears in 872 F.2d 1314, and is attached hereto as Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals was entered April 27, 1989. A timely filed Petition for Rehearing with Suggestions In Banc was denied on May 22, 1989. This petition is filed within sixty (60) days of said denial order. Jurisdiction is invoked under 28 U.S.C., Section 1254.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS CONSTITUTIONAL PROVISIONS INVOLVED

The Illinois Constitution, 1970, Article 6, Section 15(b) provides:

> (b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.

The Illinois Constitution, 1970, Article 6, Section 15(c) provides:

> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

The Illinois Constitution, 1970, Article 6, Section 15(e) provides:

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

The Illinois Constitution, 1970, Article 6, Section 15(f) provides:

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

The Illinois Constitution, 1970, Article 6, Section 13(a) provides:

(a) The Supreme Court shall adopt rules of conduct for Judges and Associate Judges.

ILLINOIS STATUTES INVOLVED

Rules of the Supreme Court of Illinois, Code of Judicial Conduct, Illinois Revised Statutes, 1987, Chapter 110A.

Illinois Supreme Court Rule 67(A) provides:

A Judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions.

Illinois Supreme Court Rule 67(A)(4) provides:

> (4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

STATEMENT OF THE CASE

Petitioner, R. Eugene Pincham, was an invited guest speaker at Operation PUSH, a Chicago civic community organization, at its weekly town hall public meeting on January 31, 1987. Petitioner spoke on Black History in America, which is celebrated throughout the United States during the month of February. During Petitioner's 30 minute unwritten spontaneous speech, the complete text of which was transcribed from an audio tape and is attached hereto as Appendix C, Petitioner spoke on the struggles of the Black American slaves for liberation and on the white abolitionists, the free Blacks and the slaves who were charged, tried and hanged during the 1741 Spring and Summer New York slave rebellion for the slaves' emancipation. Petitioner also spoke on the struggles and sacrifices during the civil rights movement led by Dr. Martin Luther King, Jr., the Congressional enactment of the 1964 Voting Rights Act, the political progress of Blacks and the election of Black Mayors and other Black public officials thereunder, on Mayor Harold Washington's candidacy for Mayor of the City of Chicago in the February 1987 Primary, and, referring to those who had unselfishly given their lives for freedom in that 1741 New York Slave Rebellion, Petitioner then hyperbolically stated:

> "Any man south of Madison Street who casts a vote in the February 24th election who doesn't cast a vote for Harold Washington ought to be hung as those were hung in New York."

Because of and based solely upon this hyperbolic statement in Petitioner's speech, the Illinois Judicial Inquiry

Board filed a complaint against Petitioner with the Illinois Courts Commission. Under Article 6, Sections 15(b), (c) and (e) of the Illinois Constitution, a nine member Judicial Inquiry Board is created to investigate and file with the Illinois Courts Commission complaints for alleged misconduct and/or violations of the Illinois Supreme Court Rules by any member of the Illinois Judiciary. The Courts Commission is empowered to remove, suspend, censor or reprimand a judge for misconduct and Article 6, Section 15(f) of the Illinois Constitution mandates that the decision of the Courts Commission is final and non-appealable.

The sole charge in the complaint against Petitioner was that the aforementioned statement in his speech constituted "political activity" allegedly in violation of Illinois Supreme Court Rules 67(a)(2) and 67(a)(4), which respectively provide:

> "A judge may not, except when a candidate for office or retention, participate in political campaigns or activities or make political contributions."
>
> "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice."

Pursuant to the provisions of 28 U.S.C., Sections 1331, 1343(a)(3) and (4), Petitioner filed in the United States District Court a complaint for declaratory and injunctive relief against the Judicial Inquiry Board and the Courts Commission. Petitioner's District Court complaint alleged that the filing of the complaint by the Judicial Inquiry Board and any disciplinary proceedings thereon against Petitioner by the Courts Commission would violate Petitioner's constitutional rights to free political speech, due process and equal protection of the laws and Petitioner's rights under 28 U.S.C. Sections 2201-2202, and 42 U.S.C. Sections 1981 and 1983. Petitioner's complaint requested the District Court to enjoin the Inquiry Board and the Courts Commission from proceeding upon any complaint against Petitioner because of or based upon Petitioner's aforementioned statement in his speech.

The Inquiry Board and the Courts Commission moved the District Court to dismiss Petitioner's complaint on "ripeness" and "abstention" grounds. The District Court made findings, which included:

> "(5) decisions of the [Illinois] Courts Commission are final in that no review by the Illinois Supreme Court or lesser Illinois Court is available [to Petitioner];"[1]

The District Court then dismissed Petitioner's complaint with the following order:

> "The defendants' Motions to Dismiss this action under the abstention doctrine first articulated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971) are granted." [2]

On appeal the United States Court of Appeals for the Seventh Circuit affirmed the District Court's order and judgment. On the issue that Petitioner did not have a state remedy for invocation and protection of his constitutional rights of free political speech, equal protection and due process because of (1), the decision of the Illinois Supreme Court in *Harrod v. Courts Commission* (1978), 62 Ill. 2d 445, that the Illinois Courts Commission lacked jurisdiction to interpret the Federal or State Constitutions or to decide constitutional issues, and (2) the finality and non-appealability of a decision of the Illinois Courts Commission, provided in Article 6, Section 15(f) of the Illinois Constitution, the Seventh Circuit completely ignored the District Court's aforementioned specific finding that "no review by the Illinois Supreme Court or lesser Illinois courts is available [to Petitioner]." Although totally unable to identify such a remedy, the Seventh Circuit nevertheless fallaciously concluded, solely from gossamer cloth, that it was "confident", and that "in all probability" the State of Illinois would

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[1] and [2] *Pincham v. Illinois Judicial Inquiry Board, et al.*, (N.D. Ill., 1988), 681 F. Supp. 1309, 1320 and 1325, Appendix C.

somehow miraculously fashion or create a remedy just for Petitioner.

The Seventh Circuit also rejected Petitioner's contentions that there existed in Petitioner's case and that Petitioner alleged in his complaint three of the recognized and accepted exceptions to the *Younger* abstention doctrine, namely:

(1) The Illinois Supreme Court Rules prohibiting "political activity" as applied to Petitioner's speech, and the disciplinary proceedings against Petitioner before the Courts Commission based thereon, flagrantly and patently violated constitutional guarantees of free political speech, due process and equal protection under law;

(2) The disciplinary procedings against Petitioner before the Courts Commission were motivated by a desire to harass Petitioner and were conducted in bad faith and violated constitutional equal protection, and

(3) There were extraordinary pressing needs for immediate equitable relief.

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW (1) TOTALLY DENY PROTECTION OF PETITIONER'S CONSTITUTIONAL RIGHTS OF FREE POLITICAL SPEECH, DUE PROCESS AND EQUAL PROTECTION OF THE LAW, (2) IGNORE RECENT COMPELLING AUTHORITIES OF THIS COURT WHICH PRECLUDE APPLICATION OF THE *YOUNGER* ABSTENTION DOCTRINE WHERE FIRST AMENDMENT CONSTITUTIONAL FREE SPEECH VIOLATIONS ARE ALLEGED, AND (3) INDEED ARE IN CONFLICT WITH *YOUNGER*, WHICH CLEARLY IS INAPPLICABLE WHEN NO STATE REMEDY IS AVAILABLE, AS IN THE CASE AT BAR.

1. The Constitutional Guarantee of Free Political Speech

The First Amendment constitutional guarantee of free speech has been held to be applicable to the States through the Due Process Clause of the Fourteenth Amendment, at least since *Gitlow v. New York* (1925), 268 U.S. 652, and this Court held in *Sweezy v. New Hampshire*, (1957), 354 U.S. 234, 250-251:

> "Our form of government is built on the premises that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights . . . Any interference with the freedom of a party is simultaneously an interference with freedom of its adherents. . . . History has amply proved the virtue of political activity by minority, dissident groups . . ."

Petitioner is an elected Justice of the Appellate Court of Illinois. He is also an American citizen who has been constitutionally guaranteed the right to freely speak his mind in political-historical matters. "Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective." *N.A.A.C.P. v. Butler* (1963), 371 U.S. 415, 452.

Petitioner did not speak from the bench or in any way use the trappings of his judicial office to promote a cause. No "political activity" is alleged against Petitioner other than the statement in the speech. While this Court has held that certain speech may not be constitutionally protected and may be regulated, e.g. obscene speech[3], "fighting words"[4], a "clear and present danger"[5] etc. this Court however *has never* ap-

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[3] *Roth v. United States* (1957), 554 U.S. 476.

[4] *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568.

[5] *Sheneck v. United States* (1919), 249 U.S. 47.

proved restrictions upon political discussions or debate.[6] Indeed, historically this Court has enthusiastically encouraged such dialogue. Illinois Supreme Court Rules 67(A)(2) and 67 (A)(4), however, when applied to Petitioner, whose only alleged violation thereof is that he made a "political" statement, violate Petitioner's First Amendment free speech guarantees, and, concomitantly the free speech guarantee of every other judge throughout America.

This is the very "self-censorship" so recently resoundedly condemned by this Court in *City of Lakewood v. Plain Dealer Publishing Company* (1988), 108 S. Ct. 2138, 2144. The case at bar, while not identical, bears a striking similarity to *Bond v. Floyd* (1966), 385 U.S. 116, where the Georgia House of Representatives sought to exclude Julian Bond, an elected legislator from membership in the Georgia Legislature, not for what he said, (criticism of the Government's Viet Nam War policies), but solely because he was an elected Georgia State Representative when he said it. The State of Georgia in *Bond*, and the Illinois Judicial Inquiry Board and Court's Commission in this case have, sought to "apply a stricter standard of speech to its legislator", and judge, than to other citizens. 385 U.S. at 133. This Court without dissent rejected Georgia's thesis and, quoting from *New York Times v. Sullivan* (1964), 376 U.S. 254, 270, said, " '*DEBATE ON PUBLIC ISSUES SHOULD BE UNINHIBITED, ROBUST AND WIDE OPEN.*' "[7]

Though these and other authorities were cited to the Court of Appeals, that Court "abstained" from deciding the merits of the alleged violations of Petitioner's First and Fourteenth Amendment Constitutional rights.

Petitioner respectfully urges that Illinois Supreme Court Rules 67(A)(2) and 67(A)(4) are facially and flagrantly in

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[6] See *Buckley v. Valeo* (1976), 424 U.S. 1; *Boos v. Barry* (1988) 108 S. Ct. 1157, 1164.

[7] Most recently quoted in *Frisby v. Schultz* (1988), 108 S. Ct. 2495, 2499.

derogation of the First and Fourteenth Amendment guarantees to free speech when application of said rules are sought against Petitioner solely on the ground that Petitioner made a "political" statement.

2. RECENT AUTHORITIES OF THIS COURT HAVE CONSTRICTED APPLICATION OF THE *YOUNGER* ABSTENTION DOCTRINE IN FIRST AMENDMENT CHALLENGES.

In the case at bar the Court of Appeals ignored other recent decisions of this Court which limit abstention and compel federal intervention. It overlooked *City of Houston v. Hill* (1987), 107 S. Ct. 2502, 2514, which held that "...*WE HAVE BEEN PARTICULARLY RELUCTANT TO ABSTAIN IN CASES INVOLVING FACIAL CHALLENGES BASED ON THE FIRST AMENDMENT*... when a statute is not ambiguous, there is no need to abstain, even if the state courts have never interpreted the statute." Also ignored by the Court of Appeals was *City of Lakewood v. Plain Dealer Publishing Company* (1988), 107 S. Ct. 2138, 2151, fn. 11, which stated:

> "But we have never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit...
>
> [T]hus, waiting for an alleged abuse before considering a facial challenge would achieve nothing except to allow the law to exist temporarily in a limbo of uncertainty *and to risk censorship of free expression during the interim.*" (Emphasis added)

While not involving the precise issue of "abstention", just this very term this Court stated, "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court's "federal policy" that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana* (1989), 109 S.Ct. 916, 923.

The opinions below also conflict with the recent decision of the Court of Appeals for the Third Circuit, *Sullivan v. City*

of Pittsburg (1987), 811 F. 2d 171, 179, which held that federal intervention is justified even in the absence of bad faith or harassment by state officials if there is an "extraordinary need for federal equitable relief." Such "need" is justified "in order to afford adequate protection of constitutional rights."

3. No State Remedy Exists

The underpinning of *Younger v. Harris* (1971), 401 U.S. 37, is comity. But where, as here, there exists no state remedy, comity considerations are irrelevant, and federal intervention is appropriate and is indeed required.

The Court of Appeals in the instant case lifted a statement, and then ignored the complete statement of this Court from *Penzoil Co. v. Texaco Inc.* (1987), 481 U.S. 1, (which did not involve an alleged First Amendment violation), that:

> "[A] federal court should assume that state procedures will afford an adequate remedy *in the absence of unambiguous authority to the contrary.*" (Emphasis added.)

The Court of Appeals in the case at bar should not have assumed that state procedure would afford Petitioner a remedy for protection and enforcement of Petitioner's constitutional rights, not only because the District Judge made an express contrary finding, but also because there was overwhelming unambiguous Illinois Supreme Court and Illinois Constitutional authority to the contrary, which the Court of Appeals ignored. The state procedure not only did not afford Petitioner a remedy, but conversely and more importantly, the state procedure affirmatively denied Petitioner any remedy for enforcement and protection of his constitutional rights.

The Supreme Court of Illinois held in *People ex rel Harrod v. Illinois Courts Commission* (1978), 69 Ill. 2d 445, 458 that under the Illinois Constitution, (1) the Illinois Courts Commission did not have the authority to interpret any

provision of the Constitutions of the United States, the State of Illinois, or any Illinois statutes, (2) all judicial power in the State of Illinois is vested in the Supreme, Appellate and Circuit Courts, and (3) the Courts Commission was not a co-equal branch of government or a court within the meaning of the Illinois Constitutional Judicial article. The Supreme Court further held in *Harrod*:

> "*The judicial power in the State is vested solely in the courts. This power includes, among other things, the authority to judicially interpret and construe constitutional provisions* and statutes when necessary. [citations] Inasmush as the Commission is not a part of the tripartite court system in this State, it possessed no power to interpret statutory ambiguities... This limitation is particularly dictated inasmuch as *this court is without the authority to review the correctness of the Commission's orders.* To intepret the Constitution as granting the Commissions such power would do violence to the intended constitutional scheme of government in this state. To grant the Commission such authority would interfere with an independent judicial system... The 'framers of the constitution sought to promote certainty and uniformity in the interpretation and declaration of the law. To that end they committed the exercise of these judicial functions to the judicial department.' [citation]
>
> The function of the Commission is one of fact finding." 69 Ill. 2d 445, 472-73. (Emphasis added.)

Subsequent to *Harrod*, the Supreme Court of Illinois held in *People ex rel The Judicial Inquiry Board v. The Courts Commission* (1982), 91 Ill. 2d 130, 134-236,

> "In Harrod, the [Illinois Supreme]court considered the Commission's authority to interpret an Illinois statute. The Court held that the Commission's constitutional authority did not extend to making 'its own independent interpretation and constuction of a statute, and that

insofar as the Commission purported to do so it exceeded its authority. A decision of the Commission based on such an independent interpretation was beyond its jurisdiction. . .

* * *

[I]t is thus established that the law which the Commission is to apply in deciding disciplinary cases is the Supreme Court Rules.

[I]n carrying out its constitutional responsibility to decide disciplinary cases, the Courts Commission must determine, based upon its understanding of the rule, whether the standards of counduct have been violated and whether under the circumstances discipline should be imposed."

By reason and under *Harrod* and *Judicial Board*, Petitioner in the instant case had no state remedy and abstention was therefore improper. As this Court held in *Gibson v. Berryhill* (1973), 411 U.S. 564,

"*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. *Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.*" 411 U.S. at 577. (Emphasis added.)

The opportunity to raise and have timely decided by a competent state tribunal the federal issues involved, stated to be a natural presupposition in *Gibson*, was totally and affirmatively absent and denied Petitioner in the instant case by the Illinois Constitution and the decisions of the Illinois Supreme Court.

On the issue of the finality and non-appealability of the Courts Commission's decision, the Illinois Supreme Court held in *People ex rel The Judicial Inquiry Board* that

"[Section 15(f) of Article 6 of the Illinois] Constitution mandates that the [Courts] Commission's deci-

> sions shall be final, the finality of the Commission's decisions is an important part of a constitutional arrangement designed to create an independent and autonomous system of judicial discipline that would be both effective and fair. [citation]. We note that even before the Constitution of 1970 elevated the finality of the Commission's decision to a Constitutional principle, this Court refused to hear appeals from its decisions. [citations]."

Despite these aforestated Illinois Supreme Court authorities of affirmitive disclaimers of the Courts Commission's jurisdiction to decide constitutional questions, and the finality and non-appealability of the Court's Commission's decisions, the Court of Appeals in the instant case conversely and contrarily speculated and conjectured:

> "In its ruling upon Justice Pincham's case the Courts Commission. . . would be construing the constitutionality of Supeme Court Rules. . . *we are CONFIDENT that the Illinois courts would in all PROBABILITY construe their Constitution so as to permit the Courts Commission to consider federal constitutional mandates when interpreting the Supreme Court Rules* during the course of a judicial disciplinary proceeding." (Emphasis added.) 872 F. 2d, 1341, 1349

Thus, the Court of Appeals "confident[ly]" conjectured that "in all probability" the courts of Illinois would uniquely permit the Courts Commission to consider federal constitutional mandates when interpreting the Supreme Court Rules during the disciplinary proceedings against Petitioner. In fact, the Court of Appeals' naked "confidence" in this "probability" so soared that the Court erroneously "convinced" itself that Petitioner failed to present "unambiguous authority" that the Courts Commission would not provide an adequate remedy. 872 F. 2d at 1347. But when Petitioner clearly established that the Illinois Constitution and Illinois case law hold that the Courts Commission lacked such authority—and

the District Court specifically so found, certainly Petitioner sustained any reasonable burden of demonstrating the lack of a state remedy. The Court of Appeals' requirement that Petitioner somehow dispell that Court's imaginative "probabilities" regarding the future, probabilities which have never previously existed, has placed an unreasonable and unconstitutional burden upon Petitioner, surely a burden never contemplated by *Younger*.

But even if the "confident" prediction of the Court of Appeals, that the Courts Commission will somehow assume the power to interpret the Federal Constitution, haphazardly turns out to be an accurate one, who will then tell the Courts Commission whether its rulings and interpretations were erroneous or correct? Under Article 6, Section 15(f) and *People ex rel Judicial Board*, 91 Ill. 2d 130, all decisions of the Courts Commissions are "final" and nonappealable. Assumption by the Courts Commission of an authority to finally interpret the Federal Constitution and rule on alleged violations thereof, *unreviewable* by any judiciary, would create a fourth branch of government in Illinois, and erect an insurmountable state procedural bar to assertions of violations of federal constitutional rights.[8]

In reality, nothing in the Illinois Constitution, the Supreme Court Rules, or the decisions of the Illinois Supreme Court remotely substantiates or justifies the Court of Appeals' "confidence", or prognostications of "probability." The decision of the Court of Appeals in the case at bar, affirming the District Court's abstention and dismissal of Petitioner's complaint has left Petitioner without any forum within which to invoke and protect his constitutional rights.

Middlesex County Ethics Committee v. Garden State Bar Association (1982), 457 U.S. 423, in which *Younger*

[8] But "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama* (1965), 380 U.S. 425, 432; *Johnson v. Mississippi* (1988) 108 S. Ct. 1981, 1987.

abstention was approved and on which the Court of Appeals mistakenly relied, is clearly distinguishable from the instant case. *Middlesex*, unlike Petitioner herein, "had abundant opportunity to present his constitutional challenges in the state disciplinary proceedings", as well as in the New Jersey Supreme Court. 457 U.S. at 458.

The Court of Appeals also mistakenly held in the case at bar that Petitioner's complaint did not set forth an exception to the *Younger* abstention doctrine. Petitioner's complaint clearly alleged existence of the *Younger* exceptions. The *Younger* exceptions alleged in Petitioner's complaint were that the disciplinary proceedings against Petitioner before the Courts Commission (1) violated Petitioner's constitutional rights of free speech and due process (2) were motivated by a desire to harass Petitioner, were conducted in bad faith and violated constitutional equal protection, (3) presented extraordinary pressing needs for immediate equitable relief and that Petitioner did not have an adequate state remedy. But this Court just recently held that existence of a *Younger* exception is not required to preempt abstention and for federal intervention.

In *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 6/19/89, No. 88-348, 49 CCH S. Ct. Bull p. B3363, 3378, 3382, which did not involve cherished constitutional free political speech, but rather only utility rates, this Court held:

> "There is no greater interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state actions . . .
>
> * * *
>
> [I]t has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the

rule that *only exceptional circumstances justify a federal court's refusal to decide a case in deference to the State.* [citations] (*'We do not remotely suggest that every pending proceeding between a State and a federal plaintiff justifies abstention unless one of the exceptions to Younger applies'.*)" (Emphasis added.)

This foregoing holding of this Court in *New Orleans Public Service* is precisely the opposite erroneous holding of the Court of Appeals in Part III of its Opinion in the case at bar, 872 F. 2d 1341, at pages 1349-1350, Appendix B.

4. THE DISCIPLINARY PROCEEDINGS AGAINST PETITIONER BY THE JUDICIAL INQUIRY BOARD BEFORE THE COURTS COMMISSION WERE FOR HARASSMENT, IN BAD FAITH, AND VIOLATE CONSTITUTIONAL EQUAL PROTECTION, WHICH PRECLUDED ABSTENTION AND REQUIRED FEDERAL INTERVENTION.

Contrary to the Judicial Inquiry Board and the Courts Commission's admissions, as a matter of law by their Motion to Dismiss Petitioner's District Court complaint, the Court of Appeals contrarily and conversely concluded that the proceedings against Petitioner were not for harassment, were not in bad faith and did not violate constitutional equal protection. The Court of Appeals statement that Petitioner "Does not argue that state judicial disciplinary action was brought against him either with the desire to harass him, much less in bad faith", simply is not true. Also, the Court of Appeals characterization of the allegations of Petitioner's complaint, that the Judicial Inquiry Board and the Courts Commission's proceedings against Petitioner, were unconstitutional selective prosecution of Petitioner, as "sketchy at best" is likewise clearly inaccurate.

Petitioner's complaint alleged with certainty and specificity, (and the Inquiry Board and Courts Commission admitted as a matter of law by their Motion to Dismiss Petitioner's

complaint) that the proceedings against Petitioner constituted:

> "invalid selective prosecution and violate Plaintiff's 14th Amendment constitutional right to equal protection of the law in that the Illinois Judicial Inquiry Board and the Illinois Court's Commission has not taken any action for engaging in political activity in violation of said Illinois Supreme Court Rules arising out of:
>
> (A) Cook County Circuit Court Judges Joseph Wosik and Joseph Powers attending and sitting on the platform next to Mayor Richard J. Daley and participating in a political rally in the 11th Ward of the City of Chicago.
>
> (B) Illinois Appellate Court Justice Michael Bilandic's political activity in attending and sitting on the stage with Mayor Harold Washington at the political function of the induction of Mayor Harold Washington, the same Mayor Harold Washington that Plaintiff allegedly endorsed for mayor but for which a complaint is made only against Plaintiff.
>
> (C) The attendance and participation of judges at the political function of raising funds for Mayor Washington's campaign at the Westin Hotel in Chicago, Illinois on or about May 1, 1987.
>
> (D) DuPage County Chief Judge Carl Henninger's alleged attendance and political activity at DuPage County Board President Jack Knueffer's fund raiser on or about May 3, 1987."

The bad faith and harassment of Petitioner by the Inquiry Board and the Court's Commission was thoroughly briefed and argued by Petitioner in the District Court in opposition to the Board and the Commission's abstention-dismissal motions.

The Court of Appeals in the instant case majestically created an original diabolical ambivilant imbroglio when it held:

> "Even if we accept Justice Pincham's allegations that other judges engaged in activity equivalent to his and were not disciplined, *we refuse to conclude that there was 'bad faith' absent allegations that the state agencies had some awareness of the other judges' activities and treated them more favorably than Justice Pincham as a part of a campaign that used prosecution, regardless of outcome, to suppress speech."* (Emphasis added)

The state agencies, i.e. the Judicial Inquiry Board and the Courts Commission, admitted that they were aware of the other judges political activities which Petitioner alleged in his complaint and that they were aware of it before Petitioner filed his complaint in the District Court. Of course, those judges have been more favorably treated than Petitioner. The Inquiry Board and the Court's Commission have not brought any complaints or proceedings against any of those judges for their flagrant and notorious partisan party political activity, which did not involve precious constitutionally protected political free speech, Petitioner's alleged "political" activity.

For the Court of Appeals to require that Petitioner allege and prove, particularly when he has been denied an evidentiary hearing by the trial court and by that court, that the Judicial Inquiry Board and the Courts Commission treated other judges "MORE FAVORABLE THAT JUSTICE PINCHAM AS A PART OF A CAMPAIGN THAT USED PROSECUTION, REGARDLESS OF OUTCOME, TO SUPPRESS SPEECH," is an unprecedented, prerequisite for the sucessful assertion of a denial of Fourteenth Amendment equal protection constitutional right, and the proposition is totally unsupported by any authority. The proposition is also a counterfactual which absolutely defies proof.

Petitioner's complaint adequately alleged harassment, bad faith and constitutional equal protection violations, exceptions to the *Younger* abstention doctrine.

5. THE ILLINOIS SUPREME COURT RULES WHEN APPLIED TO PETITIONER'S STATEMENT VIOLATE CONSTITUTIONAL DUE PROCESS AND FREE SPEECH BECAUSE OF VAGUENESS AND LACK OF SPECIFICITY.

Perhaps the aforementioned judges participated in the political activity of attending partisan party fundraising political rallys, etc., which did not involve constitutionally protected speech, because they, like Petitioner, were not informed by Illinois Supreme Court Rules 67(a)(2) and 67(a)(4) what conduct the rules prohibited. This, however, does not explain why the Inquiry Board and the Court's Commission treated them so favorably and refused to file charges against them for violating said rule because of their partisan party political activity, which did not involve speech, while filing such charges against Petitioner, whose alleged political activity was constitutionally protected speech.

The Rules provide that "a judge may not . . . participate" and a "judge should not engage" in "political activity." "Political activity" is not defined in the rules. The rules are unconstitutionally vague, uncertain and not specific. This Court held as far back as, and has consistently held since *Connally Commission v. General Construction Company* (1926), 269 U.S. 385, 391, that "[a] statute which forbids or requires the doing of an act in terms so vague than men of common intelligence must necessarily guess at its meaning and differ as to its application, violate the first essential of due process of law." 269 U.S. at 395. "Due process requires that all be informed as to what the state commands or forbids." *Smith v. Goguen* (1974), 415 U.S. 566, 574; *United States v. Culbert* (1978), 435 U.S. 370, 374.

As applied to Petitioner's statement in his speech, the said Illinois Supreme Court rules violate constitutional free

speech, as did the disciplinary rules and statutes in *NAACP v. Butler* (1963), 371 U.S. 415, in which the NAACP and its staff attorneys were found guilty of unlawfully soliciting litigants for the filing of suits by the attorneys. This Court closely examined the Virginia Canons of Legal Professional Ethics and the Virginia statutes to determine if their language sufficiently described the prohibited conduct with specificity, or if the provisions were so broad that they included within their coverage both constitutionally protected and unprotected speech and conduct. This Court held that said provisions when construed as applicable to Petitioner violated modes of expression and inhibited freedom of expression protected by the First and Fourteenth Amendments and which Virginia could not prohibit under its power to regulate the legal profession through its Cannon of Professional Ethics. This Court likewise so held in passing upon the applicability of the First Amendment free speech guarantee to disciplinary rules of the legal profession in *In Re Primus* (1978), 436 U.S. 412, and stated, "Where political expression or association is at issue, this Court has not tolerated the degree of imprecission that often characterizes government regulation of conduct of commerical affairs." 430 U.S. at 434.

For the foregoing reasons abstention in the case at bar was improper and inappropriate, and federal intervention was warranted and required. All that Petitioner has sought, and all that Petitioner now seeks is an opportunity to, and a judicial forum within which Petitioner may assert, and which is authorized to and will interpret, protect and enforce Petitioner's constitutional rights of free speech, due process and equal protection. Such judicial forum has been denied Petitioner and such denial will be permanent absent the issuance

of this Courts' Writ of Certiorari as prayed. Accordingly, Petitioner respectfully and earnestly urges that the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. EUGENE PINCHAM,

Plaintiff,

v.

THE ILLINOIS JUDICIAL INQUIRY BOARD AND ITS MEMBERS: ROBERT P. CUMMINS, CHAIRMAN, DARRELL MCGOWEN, VICE CHAIRMAN, HONORABLE PHILIP B. BENEFIEL, HONORABLE EDWARD H. MARSALEK, MARY SUE HUB, WILLIAM J. KUHFUSS, PATRICK F. MUDRON, JON R. WALTZ AND RAY F. BREEN, EXECUTIVE DIRECTOR, AND THE ILLINOIS COURTS COMMISSION AND ITS MEMBERS: HONORABLE THOMAS J. MORAN, CHAIRMAN, HONORABLE ALLAN L. STOUDER, AND HONORABLE RODNEY A. SCOTT,

Defendants.

No. 87 C 5058

HONORABLE ILANA DIAMOND ROVNER

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This is a civil rights action brought by Justice R. Eugene Pincham, Justice of the Appellate Court of Illinois, First District. The defendants are the Illinois Judicial Inquiry Board, its members and executive director (hereinafter "Inquiry Board") and the Illinois Courts Commission and three of its members (hereinafter "Courts Commission"). Presently pending before the Court are: 1) Justice Pincham's motion for

the impanelment of a three-judge court; 2) Justice Pincham's motion to file a Second Amended Complaint adding a federal voting rights claim; and 3) the Inquiry Board and Courts Commission's motions to dismiss the action.

II. AMENDED COMPLAINT

The current complaint is Justice Pincham's Amended Complaint filed on August 14, 1987. Justice Pincham was granted leave to file his Amended Complaint on June 18, 1987. Although the actual filing did not take place until two months later, the Court understands that copies of the Amended Complaint were distributed to the defendants on or about June 18, 1987. Also on August 14, 1987, Justice Pincham filed a motion for leave to further amend his complaint by adding a federal voting rights claim in a second count. Without waiting for the Court to rule on his motion for leave to amend, Justice Pincham filed his proposed new complaint. The proposed complaint, found at docket entry 37, is improperly titled. It should be entitled "Second Amended Complaint." The propriety of Justice Pincham's proposed Second Amended Complaint is discussed in part IV below. The current pleading before the Court is the Amended Complaint.

A. Facts Alleged in Amended Complaint

Justice Pincham is a black state court appellate judge. On January 31, 1987, Justice Pincham spoke at an Operation P.U.S.H. Saturday Forum. The Amended Complaint states that the following incomplete sentence was extracted from that speech and highly publicized: " 'Any man south of Madison Street who cares to vote in the February 24th election who doesn't cast a vote for Harold Washington, ought to be hung. . . .' " (Amended Complaint at ¶ 24).

According to the Amended Complaint, on February 23, 1987, Justice Pincham received a letter from defendant

Robert B. Cummins, then Chairman of the defendant Inquiry Board. The letter enclosed a transcript of Justice Pincham's remarks at the Forum and stated that the Inquiry Board proposed charges that his participation in and remarks at the Forum constituted political activity in violation of Illinois Supreme Court Rules 62, 67(A)(2) and 67(A)(4) and the introductory paragraph to Rule 61.[1] Paragraph 27 of the Amended Complaint quotes the letter as stating that Justice Pincham's conduct at the Forum constituted " 'willful misconduct in office and conduct that is prejudicial to the administration of justice and brings the judicial office into disrepute, in violation of Article VI, Section 15 of the Illinois Constitution.' " In addition, the letter informed Justice Pincham that before the Inquiry Board determined whether there existed a reasonable basis to file a complaint against him with the defendant Courts Commission, he was being notified of the charges and was required to respond to them before the Inquiry Board on March 13, 1987. (Amended Complaint at ¶ 27).

The Amended Complaint alleges that Justice Pincham and his attorneys did appear before the Inquiry Board on March 13, 1987, and presented certain constitutional arguments. They argued that Illinois Supreme Court Rules 61, 62, 67(A)(2), and 67(A)(4) did not prohibit Justice Pincham's Operation P.U.S.H. speech and that if the rules were applied or construed to prohibit his speech, then the rules violate constitutional guarantees of freedom of speech. In addition, they argued before the Inquiry Board that the rules violated due process and *ex post facto* prohibitions because of their vagueness, ambiguity, and uncertainty. Furthermore, they maintained that no reasonable basis existed to file a complaint against Justice Pincham with the Courts Commission. (Amended Complaint at ¶ 28). Subsequently, Justice Pincham submitted a written memorandum of authorities to

[1] These Rules are part of the Illinois Code of Judicial Conduct, *Ill. Rev. Stat.* ch. 110A, ¶¶ 61-71, effective January 1, 1987.

the Inquiry Board supporting his claims. A copy of the memorandum was attached to the original Complaint in this action and remains incorporated as part of the Amended Complaint. (Amended Complaint at ¶ 29).

B. Legal Claims

The Amended Complaint charges that the filing of a complaint by the Inquiry Board with the Courts Commission would violate Justice Pincham's "Constitutionally protected right of free speech, Equal Protection of the Law, Due Process and is further violative of 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983."[2] (Amended Complaint at ¶ 50). The Amended Complaint further alleges that the Supreme Court Rules at issue and the proceedings before the Inquiry Board and Courts Commission have restrained and continue to restrain Justice Pincham in the exercise of his constitutional right of free speech and in his association with members of his political party and race. In addition, Justice Pincham accuses the Inquiry Board and Courts Commission of selective prosecution and violation of his right to equal protection under the Fourteenth Amendment by not taking action against certain other judges for engaging in political activity. (Amended Complaint at ¶ 59). Justice Pincham asks the Court to declare Illinois Supreme Court Rules 67(A)(2) and 67(A)(4) unconstitutional on their face, and as applied, on the grounds that they violate his rights of free speech, equal

[2] Justice Pincham does not mention his purported 42 U.S.C. § 1981 claim in his response to the defendants' motions to dismiss. In fact, in that brief Justice Pincham describes his claim as follows: "[t]he complaint in the case at bar filed by Justice Pincham challenges the constitutional validity of these Illinois Supreme Court rules, the proceedings before the Board and any potential proceedings before the Illinois Courts Commission under the free political speech guarantee of the First Amendment to the Constitution of the United States." (Plaintiff's "Answer" to motions to dismiss at 2). The Court holds that Justice Pincham abandoned his § 1981 claim by not pursuing it in response to the motions to dismiss.

protection, and due process. Justice Pincham also asks the Court to enjoin the Inquiry Board and its members and the Courts Commission and its members from "filing or proceeding upon any Complaint against Plaintiff premised upon the Plaintiff's January 31, 1987 Operation P.U.S.H. speech. . . ." (Amended Complaint at Prayer For Relief).

III. MOTION FOR IMPANELMENT OF THREE JUDGE COURT

On August 14, 1987, Justice Pincham filed a motion for the impanelment of a three-judge court. The basis for this request was Justice Pincham's contemporaneous motion to further amend his complaint by adding a federal voting rights claim in a second count. The complete text of the motion for impanelment of a three-judge court is set out in the margin.[3] The motion to further amend is discussed in part IV of this opinion.

As can readily be seen, Justice Pincham's motion does not identify a specific statutory basis for the impanelment of a three-judge court. And, neither the proposed Second Amended Complaint, nor the written motion for leave to amend, discloses the specific statutory basis or bases for Justice Pincham's voting rights claim. It was not until the Court received Justice Pincham's untimely memorandum in response to the defendants' written objections to the further amendment that the Court was provided with a written

[3] "Now comes the Plaintiff, R. Eugene Pincham, by and through his attorneys, Robert E. Pincham, Jr., Ltd. and T. Lee Boyd, Jr., and Associates, Ltd., and moves this Honorable Court to enter an Order Impanelling a Three Judge Court as provided by the *Voting Rights Act [sic], 42 U.S.C. Sec. 1971, et seq.*"

confirmation of the nature of the new federal statutory claims.[4]

Unfortunately, receipt of Justice Pincham's written response to the defendants' objections did not completely end the mystery. Justice Pincham identified the specific statutory provisions in the following unedited sentence:

> [t]he Voting Rights Act, 42 USC Section 1971(a) and Section 1973(a), and (i)(b) protect the rights of all citizens to freely participate in the electoral process and guarantees that black citizens not suffer a punishment or restriction upon their participation which is not also imposed upon white citizens similarly situated.

(Plaintiff's Response Brief at 2). There is, however, no § 1973(i)(b) within Title 42. The Court therefore assumed that Justice Pincham was referring to § 1973i(b) which is found within Title 42. In summary, the Court has concluded that Justice Pincham has asserted 42 U.S.C. §§ 1971(a), 1973(a) and 1973i(b) as the three bases for his proposed voting rights claims against the defendants.

Returning to the three-judge court question, not all actions brought pursuant to the federal voting rights statutes, 42 U.S.C. § 1971 *et seq.*, provide for the impanelment of three-judge courts. With regard to Justice Pincham's § 1971(a) claim, assuming *arguendo* that a private right of action exists under this subsection, the provisions of subsections 1971(c) and (d) describe the nature of the cause of

[4] When the motions to amend and for a three-judge court were presented on August 14, 1987, the Court ordered the parties to file cross briefs on both motions. Justice Pincham failed to file the required brief and instead requested leave to file a response to the defendants' written objections. By order dated August 31, 1987, the Court denied Justice Pincham's request to file a response brief. On February 22, 1988, the Court *sua sponte* reconsidered its decision and granted Justice Pincham's motion for leave to file the response brief. The Court took this step to ensure that Justice Pincham's only written explanation of the nature of his voting rights claim became part of the record.

action and the jurisdiction of the federal courts. Neither subsection provides for the impanelment of a three-judge court. Indeed, the sole three-judge provision in § 1971 can be invoked only in actions instituted by the United States and only when the Attorney General requests the court to find that a deprivation of rights has occurred pursuant to a pattern or practice. Even after giving Justice Pincham's § 1971(a) claim the broadest possible reading, the Court is unable to conclude that the three-judge provision found in § 1971(g) has been triggered. Therefore, Justice Pincham's § 1971(a) claim does not allow for the impanelment of a three-judge court.

As to Justice Pincham's § 1973(a) and § 1973i(b) claims, and again assuming *arquendo* that private rights of action exist under these subsections, the provisions of § 1973j describe the nature of the causes of action and the jurisdiction of the federal courts. Section 1973j simply does not provide for the impanelment of a three-judge court.

The Court cannot order the impanelment of a three-judge court unless there is a statutory basis for that action. Justice Pincham's only attempt to delineate a statutory basis was his general citation to federal voting rights statutes. Because, as discussed above, those sections of the voting rights statutes upon which Justice Pincham relies in support of his motion to further amend the Amended Complaint do not provide for the impanelment of three-judge courts, the Court holds that it lacks the power to grant Justice Pincham's motion. Therefore, Justice Pincham's motion requesting the impanelment of a three-judge court is denied.

IV. MOTION TO FURTHER AMEND THE AMENDED COMPLAINT

On August 14, 1987, Justice Pincham filed a motion seeking leave of court to further amend his Amended Complaint by adding a federal voting rights claim. The complete text of the motion is set out in the margin.[5] The proposed Count II would add four paragraphs to the allegations of the Amended Complaint. The complete text of the new proposed paragraphs is also set out in the margin.[6] The defendants have raised a number of objections to Justice Pincham's motion for leave to further amend.

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[5] "Now comes the Plaintiff, R. Eugene Pincham, by and through his attorneys, Robert E. Pincham, Jr., Ltd., and T. Lee Boyd, and Associates, Ltd., and moves this Honorable Court to grant leave to file Count II and to add Count II to the Amended Complaint."

[6] "1) The aforesaid speech delivered by R. Eugene Pincham at Operation P.U.S.H. in January, 1987 was delivered to a racially integrated group of potential voters.

2) R. Eugene Pincham advocated, during the course of his speech, that the racially integrated group of potential voters cast their ballot for a black candidate.

3) It is Plaintiff's contention that the *VOTING RIGHTS ACT, 42 U.S.C. Section 1971 et seq.*, prohibits and precludes the imposition of punishment upon and against black voters for the exercise of free political speech, *when* such punishments are not imposed upon white citizens similarily situated engaged in political speech or activities.

4) Defendants have represented to this Court that the portion of the speech delivered by R. Eugene Pincham in which he advocated that potential voters cast their election ballot for a black candidate is the basis for the implementation of disciplinary proceedings against R. Eugene Pincham by Defendants, *and Defendants have made no showing* that any similar disciplinary action or punishment has ever been contemplated or imposed by Defendants against any white judge for engaging in any political activity or speech which advocated that potential voters cast their ballot for a black or white candidate." (Emphasis added).

The Inquiry Board and Courts Commission's objections fall into two general categories. Both defendants argue that 1) Justice Pincham's conduct has been dilatory throughout this case and that the proposed amendment is brought in bad faith with the improper motive of causing further delay to the detriment of the defendants, and 2) that the proposed amendment would be futile because the asserted voting rights claims fail to state claims and are meritless.

The standard governing amendments is set out in Federal Rule of Civil Procedure 15(a) which provides in part that "leave [to amend] shall be freely given when justice so requires." While it is certainly true that Justice Pincham's counsel has demonstrated an inability to comply with briefing schedules, the Court cannot conclude based on their past conduct that the present motion has been brought for improper motives. Nor can the Court conclude that the proposed amendment, given the present posture of the case, will *unduly* delay the resolution of this case. Therefore, the Court rejects the defendants' dilatoriness, bad faith, improper motive, and undue delay objections to the amendment. However, the Court finds a great deal of merit in the defendants' futility of amendment arguments as they relate to Justice Pincham's voting rights claims.

As discussed above in part III, Justice Pincham has asserted claims pursuant to three provisions of the federal voting rights statutes—42 U.S.C. §§ 1971(a), 1973(a) and 1973i(b).[7] It is certainly true that Rule 15(a) evidences a policy within the federal courts of freely permitting amendment. As an exercise of its discretion, however, a district court may

[7] As noted in part III, Justice Pincham failed to specify the sections of the voting rights statutes upon which he was relying until well after he filed his motion for leave to amend. Indeed, at the August 14, 1987, hearing, Justice Pincham's counsel was unable to specify the sections upon which his proposed second count was based. The language of proposed Count II, quoted in footnote 5, suggests that Justice Pincham's voting rights claim is limited to an

" 'deny leave to amend where the proposed amendment fails to allege facts which would support a valid theory of liability, . . . or where the party moving to amend has not shown that the proposed amendment has substantial merit. . . ." *Goulding v. Feinglass*, 811 F.2d 1099, 1103-1104 (7th Cir. 1987) *cert. denied* ____ U.S. ____, 107 S.Ct. 3215 (quoting *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979)). The Court will apply this standard to each of Justice Pincham's three statutory claims.

Section 1971(a) of Title 42 provides in relevant part:

> (a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.
>
> (2) No person acting under color of law shall—
>
> > (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;
>
> * * *
>
> (e) . . . When used in the subsection, the word "vote" includes all action necessary to make a vote effective

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equal protection analysis. He decries limitations on conduct *only* when similar limitations are not placed on white citizens, or more specifically white judges. The Court believes that Justice Pincham's designation of §§ 1971(a), 1973(a), and 1973i(b) was in actuality an afterthought. Even so, the Court will analyze the merits of his claims under each section.

> including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; . . . .

The essence of a § 1971(a) action is a denial or abridgement of the right to vote. Nowhere in the Amended Complaint as it stands, or in the proposed additional paragraphs, has Justice Pincham alleged that his right to vote has been denied or abridged by the actions of the defendants. Justice Pincham has not, in fact, alleged that anyone's right to vote has been impacted.

Justice Pincham cited to six cases in his response memorandum in support of his voting rights claims: 1) *United States v. McLeod,* 385 F.2d 734 (5th Cir. 1967); 2) *United States v. Bruce,* 353 F.2d 474 (5th Cir. 1965); 3) *United States v. Wood,* 295 F.2d 772 (5th Cir. 1961) *cert. denied* 369 U.S. 850 (1962); 4) *United States v. Beaty,* 288 F.2d 653 (6th Cir. 1961); 5) *United States v. Bibb County Democratic Executive Committee,* 222 F.Supp. 493 (M.D. Ga. 1962); and 6) *United States v. Raines;* 189 F.Supp. 121 (M.D. Ga. 1960). *Bruce, McLeod, Beaty,* and *Wood* were all actions brought by the government pursuant to § 1971(b) and provide no support for Justice Pincham's § 1971(a) or his § 1973(a) claims. *Bibb County* and *Raines* were § 1971(a) actions that alleged specific activities by the defendants that directly interfered with black citizens' rights to vote. In *Bibb County,* the defendants maintained a system of segregated polling places and segregated voting machines. The defendants also published the election results on a racially designated basis. *Bibb County,* 222 F.Supp., at 494-495. In *Raines,* the defendants maintained a voter registration system that 1) used different colored registration applications for black and white voters, 2) kept registration and voting records segregated by race, 3) delayed black voters' registration applications, 4) gave prospective black voters different and more difficult literacy

tests, 5) allowed white applicants to take literacy tests in groups while requiring black applicants to take literacy tests individually, and 6) required a higher literacy standard for black voters than for white voters. *Raines*, 189 F.Supp., at 133-134. Justice Pincham has not alleged any conduct by the defendants' that is even remotely similar to the abhorrent actions of the defendants in *Bibb County* or *Raines*. Therefore, neither of these two cases provides any support for his § 1971(a) claim.

The Court holds that Justice Pincham has failed to allege facts that would support a theory of liability under § 1971(a). The Court further holds that Justice Pincham has failed to show that his proposed § 1971(a) claim has substantial legal merit. Therefore, Justice Pincham's motion to further amend the Amended Complaint to include a 42 U.S.C. § 1971(a) claim is denied.

Section 1973 of Title 42 provides in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, . . . as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Emphasis in original). As with a § 1971(a) action, the essence of a § 1973(a) action is a denial or abridgement of the right to vote. Justice Pincham's failure to allege that he or anyone else has had their right to vote denied or abridged by the actions of the defendants is fatal to a § 1973(a) action. Justice Pincham has cited not a single case in support of his proposed § 1973(a) claim. None of the six cases discussed above were brought pursuant to § 1973.

The Court holds that Justice Pincham has failed to allege facts that would support a theory of liability under § 1973(a). The Court further holds that Justice Pincham has failed to show that his proposed § 1973(a) claim has substantial legal merit. Therefore, Justice Pincham's motion to further amend the Amended Complaint to include a 42 U.S.C. § 1973(a) claim is denied.

Section 1973i(b) of Title 42 provides:

> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

This section proscribes conduct that amounts to intimidation, threats, or coercion. As discussed in footnote 6, Justice Pincham's proposed additional count is phrased in equal protection terms. His new allegations are therefore inconsistent with the language of this section which is not aimed at disparate treatment. Justice Pincham's reference to this section is particularly indicative of how the horse came after the cart with regard to his voting rights claims.

Beyond the general inconsistency between Justice Pincham's allegations of disparate treatment and the provisions of this section, there is also no allegation that the defendants

intended to intimidate, threaten, or coerce Justice Pincham. Allegations and later proof of such an intent is an essential element of a § 1973i(b) claim. *Olaques v. Russoniello,* 797 F.2d 1511, 1522 (9th Cir. 1986) *vacated on other grounds* ____ U.S. ____, 108 S.Ct. 52 (1987). Additionally, Justice Pincham has cited not a single case in his response to the defendants' objections that even mentions § 1973i(b).

The Court holds that Justice Pincham has failed to allege facts that would support a theory of liability under § 1973i(b). The Court further holds that Justice Pincham has failed to show that his proposed § 1973i(b) claim has substantial legal merit. Therefore, Justice Pincham's motion to further amend the Amended Complaint to include a 42 U.S.C. § 1973i(b) claim is denied.

Having determined that Justice Pincham has not met his burden with regard to any of his three purported statutory claims, the Court denies his motion to further amend his Amended Complaint by adding a second count.[8]

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[8] On August 14, 1987, the Court denied the petition of Operation P.U.S.H. to intervene in this action as a plaintiff. In response to the defendants' standing argument, Justice Pincham asks the Court to reconsider its decision to deny intervention. (Plaintiff's Response brief at 2). The Court did not reject Justice Pincham's § 1971(a), § 1973(a), and § 1973i(b) claims for lack of standing. Nevertheless, the Court wishes to specifically note that Operation P.U.S.H.'s Intervention would not have saved the voting rights claims. Along with its petition to intervene, Operation P.U.S.H. filed a document entitled "Notice of Adoption of Pleadings" the entire text of which is as follows: "[n]ow comes the plaintiff OPERATION P.U.S.H., by and through its attorney, Lewis Myers, Ltd., and to avoid unnecessary delay in these proceedings, respectfully adopts the pleadings filed in the cause by plaintiff R. Eugene Pincham and further adopts the pleadings filed on his behalf by all amicus curiae." The wholesale adoption contemplated by Operation P.U.S.H. obviously would have failed to rectify the deficiencies in Justice Pincham's pleadings and arguments that led to the Court's holdings against the voting rights claims.

V. MOTIONS TO DISMISS

Both the Inquiry Board and the Courts Commission have moved to dismiss this action on ripeness grounds, under the abstention doctrine first articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and under the *Pullman* abstention doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). As set out below, the Court finds Justice Pincham's claims to be ripe for adjudication, but agrees with the defendants that the *Younger* abstention doctrine requires the dismissal of this action in favor of the state proceedings. Because the *Younger* doctrine is controlling, the Court does not reach the applicability of the *Pullman* doctrine. Before turning to an examination of the applicability of the *Younger* doctrine to this case, it is appropriate to discuss both the nature and posture of the state proceedings about which Justice Pincham complains.

A. The State Proceedings

(1) Their Nature

Both the Inquiry Board and the Courts Commission were created and empowered by the 1970 Illinois Constitution:

> (b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party. The terms of Board members shall be four years. A vacancy on the Board shall be filled for a full term in the manner the original appointment was made. No member may serve on the Board more than eight years.
>
> (c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board

shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the Judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to charge that the Judge or Associate Judge is physically or mentally unable to perform his duties. All proceedings of the Board shall be confidential except the filing of a complaint with the Courts Commission. The Board shall prosecute the complaint.

(d) The Board shall adopt rules governing its procedures. It shall have subpoena power and authority to appoint and direct its staff. Members of the Board who are not Judges shall receive per diem compensation and necessary expenses; members who are Judges shall receive necessary expenses only. The General Assembly by law shall appropriate funds for the operation of the Board.

(e) A Courts Commission is created consisting of one Supreme Court Judge selected by that Court, who shall be its chairman, two Appellate Court Judges selected by that Court, and two Circuit Judges selected by the Supreme Court. The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his duties.

(f) The concurrence of three members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

(g) The Commission shall adopt rules governing its procedures and shall have power to issue subpoenas.

> The General Assembly shall provide by law for the expenses of the Commission.

ILL. CONST. 1970 art. VI, § 15(b)-(g). These provisions of the Illinois Constitution create "a comprehensive system of judicial discipline." *Owen v. Mann*, 105 Ill. 2d 525, 475 N.E.2d 886, 890 (1985).

The interrelationship between the Inquiry Board, the Courts Commission, the Illinois Supreme Court, and the Illinois trial and appellate courts has come before the Illinois Supreme Court twice since the 1970 Constitution took effect. In *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill.2d 445, 372 N.E.2d 53 (1977), the Illinois Supreme Court analyzed the extent of the Courts Commission's authority under the Illinois Constitution. The Court ordered the Courts Commission to expunge a sanction against a Judge which the Courts Commission had entered after determining that the Judge had misapplied a Illinois criminal sentencing statute. The Court noted that "[i]nasmuch as the Commission is not a part of the tripartite court system in this State, it possesses no power to interpret statutory ambiguities or to compel Judges to conform their conduct to any such interpretation." *Id.*, 372 N.E.2d, at 66. The Court also held that "only conduct violative of the Supreme Court Rules of judicial conduct may be the subject of a complaint before the Commission." *Id.*, 372 N.E.2d, at 64.

The Illinois Supreme Court expanded upon its analysis of the state constitutional system of judicial discipline in *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 435 N.E.2d 486 (1982). In that case, the Inquiry Board sought a writ of mandamus from the Illinois Supreme Court to compel the Courts Commission to reinstate a complaint filed by the Inquiry Board which the Courts Commission had dismissed. The Inquiry Board argued that the Courts Commission had exceeded its state constitutional authority by interpreting the Supreme Court Rules of judicial

conduct. The Court completely rejected the Inquiry Board's arguments and held that:

> [t]he Courts Commission is the body with the constitutional responsibility for applying the Rules of Judicial conduct to particular cases. We conclude that its constitutional authority to hear and determine disciplinary cases necessarily includes the power to interpret the rules it applies in deciding cases before it.

Id. 435 N.E.2d, at 488. After reiterating its holding in *Harrod* that the Illinois Constitution vested the Illinois Supreme Court with the responsibility for promulgating standards of judicial conduct, and that therefore, the Courts Commission's decisions must be based on the Illinois Supreme Court Rules, the Court described the constitutional role of the Courts Commission:

> [t]he Commission's function is adjudicative, and interpretation of the legal rule the tribunal is applying is an inherent and inescapable part of the adjudicative process.
>
> * * *
>
> The trial court, which, like the Commission, decides cases by finding the facts and applying the law to them, must first read the relevant statute and appellate cases and *based on its understanding of them* determine what, on the facts before it, the law requires.

People ex rel. Judicial Inquiry Board, 435 N.E.2d, at 489 (emphasis in original). The Court also addressed the finality of the Courts Commissions' decisions:

> [i]n asking this court to hold that the Commission has misinterpreted Rule 62, the Board is actually asking that we review the correctness of the Commission's application of the rule in a particular decision. This we cannot do. The Constitution mandates that the Commission's decisions shall be final. The finality of the Commission's decisions is an important part of a constitutional arrangement designed to create an independent and autonomous system of judicial discipline that would be both effective and fair.

* * *

> We point out that this court is not without power to affect the decisions of the Commission and its interpretation of our rules, but according to the constitutional arrangement we do so not by reviewing the Commission's decisions, but by amending the rules which it applies.

Id. Based upon its discussion of the state constitutional principles, the Illinois Supreme Court concluded that it had improvidently granted leave to file the petition for mandamus and denied the writ.

The provisions of the Illinois Constitution quoted above, coupled with the three cited Illinois Supreme Court decisions construing those provisions, lead this court to make the following findings:

1) the Inquiry Board is the constitutionally authorized body empowered to investigate, charge, and prosecute Illinois judges accused of misconduct;

2) the Courts Commission is the constitutionally authorized body empowered to adjudicate complaints filed by the Inquiry Board;

3) violations of the Illinois Supreme Court Code of Judicial Conduct must form the basis of any complaint filed with the Courts Commission;

4) the Courts Commission is vested by the Illinois Constitution with the authority to interpret and apply the rules of judicial conduct in the cases before it;

5) decisions of the Courts Commission are final in that no review by the Illinois Supreme Court or lesser Illinois courts is available; and

6) the Illinois Supreme Court is empowered to ensure that the Courts Commission acts only within its state constitutional authority.

These findings lead the Court to further conclude that in the Illinois constitutionally created system of judicial discipline, the Illinois Supreme Court serves in effect as the legislative

body in enacting the rules of judicial conduct, the Inquiry Board serves in effect as the executive body charged with investigating and prosecuting violations of the rules of judicial conduct, and the Courts Commission serves in effect as the judicial body charged with interpreting and applying the rules of judicial conduct when it adjudicates the complaints filed by the Inquiry Board. The Court will examine just how the Illinois system of judicial discipline comports with the *Younger* doctrine in subpart B below.

(2) Their Posture

In paragraph 47 of his Amended Complaint, Justice Pincham alleges that the Inquiry Board "intends to and will file a complaint with the defendant Illinois Courts Commission . . . ." On June 8, 1987, during the hearing on Justice Pincham's request for a Temporary Restraining Order, counsel for the Inquiry Board informed the Court that the Inquiry Board had indeed determined to file a complaint with the Courts Commission. Counsel also pledged that his clients would not actually file the complaint until the matters pending in this Court were resolved.

On January 28, 1988, the Court held a status hearing for the purpose of inquiring of the Inquiry Board's counsel whether the recent change in the membership of the Inquiry Board (five new members had been appointed) had affected the decision to file the complaint. Counsel contacted his clients and reported back to the Court on February 2, 1988, that the newly constituted Inquiry Board had voted to proceed with the action against Justice Pincham and that they were refraining from filing their now drafted complaint only because of the pledge made to this Court at the inception of this case.

Therefore, the posture of the state proceedings is that the Inquiry Board has voted to file a complaint against Justice Pincham with the Courts Commission, the Inquiry Board has

prepared a draft complaint, and the only reason the Inquiry Board has refrained from filing its complaint is to honor the pledge made to this Court.

B. The *Younger* Abstention Doctrine

In *Younger v. Harris*, 401 U.S. 37 (1971), the appellee, Harris, was charged in state court with violating the California Criminal Syndicalism Act. While the criminal case was pending in state court, Harris brought a federal action challenging the prosecution and the Act itself on constitutional grounds. A three-judge district court found the Act to be unconstitutional and enjoined the prosectution of Harris. The Supreme Court reversed, holding that the district court should have abstained from enjoining the state court proceedings.

The Supreme Court spoke of the "long-standing public policy against federal court interference with state court proceedings . . . ," *Id.*, 401 U.S., at 43, and found that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.*, 401 U.S., at 45. The vital consideration behind such deference is the notion of comity, defined by the Court as:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id., 401 U.S., at 44.

In keeping with this doctrine, the Supreme Court observed that it had long held that federal courts should not interfere with state prosecutions, barring extraordinary circumstances where the danger of irreparable injury is both

great and immediate. *Id.*, 401 U.S., at 46. An accused should first be required to rely upon his defenses in state court, even though it may involve a challenge to the validity of a statute, unless it is clear that this would not provide the accused adequate protection. *Id.*, 401 U.S., at 45. The Supreme Court held that the possible unconstitutionality of a statute on its face cannot alone justify an injunction against good faith attempts to enforce it and that Harris had failed to demonstrate bad faith, harassment, or some other unusual circumstance that would require federal equitable relief. *Id.*, 401 U.S., at 54.

Although *Younger* involved the issue of federal court intervention in state criminal prosecutions, the doctrine has since been extended to cover other actions where important state interests are at stake. *See, e.g., Pennzoil Co. v. Texaco, Inc.*, ___ U.S. ___; 107 S.Ct. 1519 (1987) (state court civil judgment enforcement proceedings); *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986) (state administrative civil rights proceedings); *Moore v. Sims*, 442 U.S. 415 (1979) (state proceedings related to child abuse); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state civil action seeking a return of welfare payments alleged to have been wrongfully received); *Juidice v. Vail*, 430 U.S. 327 (1977) (contempt proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceeding). *See also Brunken v. Lance*, 807 F.2d 1325 (7th Cir. 1986) (child protective custody dispute).

The Supreme Court has also applied the *Younger* abstention doctrine in an attorney disciplinary action. In *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423 (1982), an attorney was served with a formal statement of charges of violating certain New Jersey Supreme Court disciplinary rules. Instead of filing an answer to the charges, the attorney and three organizations of attorneys filed suit in federal district court contending that the disciplinary rules violated their First Amendment rights and were facially vague

and overbroad. The Supreme Court held that abstention was proper. In reaching this conclusion, the Supreme Court broke its analysis into three components:

> *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Id., 457 U.S., at 432 (emphasis in original). These three components also provide the proper framework for the *Younger* analysis in the instant case. Transposed to the facts of this case, the three questions are:

1) do judicial disciplinary hearings within the constitutionally prescribed jurisdiction of the Inquiry Board and the Courts Commission constitute an ongoing state judicial proceeding;

2) do the state judicial disciplinary proceedings implicate important state interest; and

3) is there an adequate opportunity for Justice Pincham to raise his constitutional challenges in the state disciplinary proceedings.

(1) Ongoing State Judicial Proceedings

As discussed above, the Inquiry Board has completed its investigation of Justice Pincham and has voted to file a complaint with the Courts Commission.[9] The Inquiry Board has also prepared a draft complaint which it is prepared to

[9] Justice Pincham has repeatedly admitted that a decision by the Inquiry Board *not* to file a complaint with the Courts Commission would have mooted this entire case.

> If the Board has not voted and has no intention to file a complaint against Justice Pincham with the Courts Commission, the instant suit as well as the defendants' abstention motions are moot. If such is the case, the attorneys herein and

prosecute in the Courts Commission proceedings. Justice Pincham was notified on February 23, 1987, of the pending investigation and was required to appear before the Inquiry Board. (Amended Complaint at ¶¶ 27 and 28). Justice Pincham was given an opportunity to argue before the Inquiry Board both that his conduct was not violative of the rules of judicial conduct and that his conduct was protected by provisions of the United States Constitution. (*Id.*) Justice Pincham also submitted a lengthy brief to the Inquiry Board setting forth his legal arguments.[10] (Amended Complaint at ¶ 29; Brief attached as an exhibit to the Complaint).

> this court are engaged in useless litigation and Justice Pincham would join in the abstention motion and everyone can return home happily.

(Plaintiff's "Answer" to Motions to Dismiss at 14).

> Defendants offer that three of the Board's eight members terms expire on December 14, 1987 and the term of another Board member expires on December 27, 1987.
>
> * * *
>
> Indeed, if the new Board members determine that no complaint should be filed by Defendants against Plaintiff, there is no reason for this Court [to] rule in these matters and both Plaintiff's Complaint and Defendant's Motion to Dismiss may become moot on or about December 27, 1987.

(Plaintiff's Response to Defendants' Motion to Set Matter for Ruling at ¶¶ 8 and 11). This admission further undercuts Justice Pincham's purported federal voting rights claims by recognizing that the investigation by the Inquiry Board would not in and of itself infringe upon any statutory rights. It was only the decision of the Inquiry Board against him that he finds objectionable, not the process leading up to the decision.

[10] Although Justice Pincham has had an opportunity to present his constitutional arguments to the Inquiry Board, it is not essential that such an opportunity exist before the *Younger* doctrine becomes applicable. The Supreme Court addressed this point in *Ohio Civil Rights Commission, supra*:

> Dayton also contends that the administrative proceedings do not afford the opportunity to level constitutional challenges against the potential sanctions for the alleged sex discrimination.

The Inquiry Board proceedings must be viewed as only one part of the two-part state judicial discipline system. The second step, the adjudication before the Courts Commission has not yet begun. Because the Inquiry Board has voted to file its draft complaint with the Courts Commission and has delayed only to keep its pledge to this Court, there is no question that the state proceedings are "ongoing." Indeed, Justice Pincham has not argued otherwise. What Justice Pincham does argue, in essence, is that the Illinois Courts Commission is not a judicial body.

Justice Pincham does not argue that the procedures before the Courts Commission are themselves unfair nor does he argue that the Courts Commission will not consider his constitutional arguments. He argues that this Court cannot abstain in favor of an entity that is, pursuant to the provisions of the Illinois Constitution, independent of the regular state judicial system.

In subpart A above, the Court analyzed the state judicial discipline system. The Court concludes that the Courts Commission is, in fact, an independent state court with a very limited jurisdiction.[11] Its jurisdiction is limited to

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* * *

> In any event, it is sufficient under *Middlesex, supra,* 457 U.S., at 436, 102 S.Ct., at 2523, that constitutional claims may be raised in state court judicial review of the administrative proceeding.

Ohio Civil Rights Commission v. Dayton Christian Schools, 106 S.Ct., at 2724 (1987).

[11] The Rules of Procedure of the Courts Commission, 1 Ill. Cts. Com. pp. XXIV-XXVIII (1980) (effective July 17, 1972), afford the procedural safeguards that are the hallmarks of American courts. Formal proceedings are commenced by the filing of a complaint which "shall specify in plain and concise language the charges against the judge and the allegations of fact upon which such charges are based. . ." (Rule 3). The respondent judge has twenty-one days to file responsive pleadings to the complaint. (Rule 3). The respondent judge is entitled to a hearing. (Rule 9). Except where

adjudicating complaints against state judges brought by the Inquiry Board for alleged violations of the Illinois Supreme Court Code of Judicial Conduct. The fact that no superior court will review the decisions of the Courts Commission does not serve to invalidate the system. Under the New Jersey attorney disciplinary system analyzed in *Middlesex*, only one court—the New Jersey Supreme Court—would hear and decide constitutional arguments. *Middlesex*, 457 U.S., at 427, n. 4.

None of the parties has cited any case or other authority that discusses the significance of the independence of the Courts Commission from the remainder of the state judicial system. Indeed, it is not clear that the parties have even recognized the existence of this issue. Nonetheless, this is the issue that confronts the Court. The Court holds that the principles of comity and federalism first enunciated in *Younger* require this Court to abstain in favor of an independent state court, established by the Illinois Constitution for the express purpose of adjudicating judicial discipline cases, so long as the other requirements for abstention are met. The fact that the state tribunal is independent of the other parts of the state court system is no impediment to the application of the *Younger* doctrine.

(2) State Interests

Under this component of the *Younger* analysis, the Court must determine whether the state proceedings involve an important state interest. The *Middlesex* court found that the State of New Jersey had "an extremely important interest in

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inappropriate, the provisions of the Illinois Code of Civil Procedure and civil rules of evidence shall govern. (Rule 11). The allegations in the complaint must be proven by clear and convincing evidence. (Rule 11). The respondent judge may obtain compulsory process for the attendance of witness and may cross-examine any witness against him. (Rules 15 and 23). The hearing is public. (Rule 12). A verbatim transcript of the proceedings is kept. (Rule 22). And, a written order is preserved at the conclusion of the hearing. (Rule 21).

maintaining and assuring the professional conduct of the attorneys it licenses." *Middlesex*, 457 U.S., at 434. *See also Goldfarb v. Virginia State Bar*, 421 U.S., 773, 792 (1975); *Sekerez v. Supreme Court of Indiana*, 685 F.2d 202, 205 (7th Cir. 1982).

A state's interest in assuring the integrity and professional conduct of its judiciary is certainly at least as important as its interest in assuring the professional conduct of the attorneys it licenses. *Coruzzi v. State of New Jersey*, 705 F.2d 688, 691 (3rd Cir.1983). Although state disciplinary proceedings must protect the constitutional rights of the individual subject to discipline, "it is equally clear that a state's interest in regulating its judiciary is so compelling that a federal district court should not intervene, unless one of the *Younger* exceptions applies." *Dostert v. Neely*, 498 F.Supp. 1144, 1153 (S.D. W.Va. 1980). This Court agrees that Illinois' interest in maintaining the integrity of its judiciary is a vital and compelling one.

(3) Opportunity to Raise Constitutional Challenges

With regard to this component of the *Younger* analysis, Justice Pincham has the burden of showing that he will not have the opportunity to raise his constitutional claims before the Courts Commission. *Pennzoil Co. v. Texaco, Inc.*, ____U.S. ____, 107 S.Ct. 1519, 1528 (1987). As noted above in subpart B.(1), Justice Pincham has never argued that the Courts Commission will not hear and carefully consider his constitutional arguments. In addition, the Court notes that the members of the Courts Commission, state court judges all, have sworn to uphold the rights guaranteed by the United States Constitution. The Court concludes based upon its review of the Rules of Procedure of the Courts Commission as well as based upon the Court's findings with regard to the Courts Commission's state constitutional authority, that the Courts Commission will hear and resolve Justice Pincham's constitutional claims.

Because all three components of the *Younger* abstention analysis support the defendants' motions asking this Court to abstain in favor of the state proceedings, this Court must abstain unless one of the exceptions to the *Younger* doctrine applies.

C. Exceptions to the *Younger* Doctrine

Middlesex and *Younger* hold that, even when the three-part analysis is met, certain exceptional circumstances may render abstention unwarranted. Abstention is not appropriate if: (1) the disciplinary proceedings were brought in bad faith or to harass the plaintiff; or (2) the state rules are "flagrantly and patently" unconstitutional no matter how they may be applied. *Middlesex*, 457 U.S., at 437; *Younger*, 401 U.S., at 53-54. Justice Pincham argues that both exceptions apply to the instant case.

The bad faith exception is a narrow one and is to be granted parsimoniously. *Hensler v. District Four Grievance Committee*, 790 F.2d 390, 392 (5th Cir. 1986). A plaintiff alleging that a state proceeding has been initiated against him in bad faith must allege specific facts to support an inference of bad faith. More than a mere allegation or a 'conclusory' finding is required to bring a case within the *Younger* harassment exception. Specific evidence must demonstrate that state prosecution " 'was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.' " *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 98 (7th Cir. 1986) *cert. denied* ____ U.S. ____, 107 S.Ct. 3228 (1987) (quoting *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)). *See also Grandco Corp. v. Rochford*, 536 F.2d 197, 203 (7th Cir. 1976).

In affirming the district court's dismissal of the complaint in *Collins*, the Seventh Circuit held that the complaint did not allege facts demonstrating bad faith prosecution. In reaching this conclusion, the Seventh Circuit stated that the

complaint did not show that state officials were " 'using or threatening to use prosecutions, *regardless of their outcome*, as instrumentalities to suppress speech.' " *Collins*, 807 F.2d, at 101 (quoting *Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969) (emphasis in original). Nor, the court continued, had the complainants showed that a statute was enforced against them merely to discourage the exercise of protected rights with no expectation of convictions. *Id.*

Justice Pincham has failed to allege that the Inquiry Board and Courts Commission have no expectation of taking action on the charges against him. Furthermore, he has failed to allege or argue that the sole reason for the initiation of the proceedings was to prevent him from exercising his protected rights. *Collins*, 807 F.2d, at 101. In his complaint, Justice Pincham merely alleges that the proceedings constitute "selective prosecution" and makes reference to the alleged failure of the Inquiry Board and Courts Commission to take action against certain other judges in connection with alleged political activity. (Amended Complaint at ¶ 59). However, the instances of alleged political activity described by Justice Pincham can all be distinguished from the instant action in that none of these allegations involve public speaking. The Court finds that Justice Pincham's allegations are sketchy at best and clearly insufficient to make the requisite showing of bad faith or harassment.

The final issue is whether the Illinois Supreme Court Rules at issue[12] are " 'flagrantly and patently' " unconstitu-

[12] The Rules challenged in the complaint are:

Rule 61 "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. . . . "

Rule 62(A): "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

tional. *Middlesex*, 457 U.S., at 437 (citing *Younger*, 401 U.S., at 53).

The Court finds that the Rules at issue cannot be said to be " 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph,' " no matter how they are applied and against whomever they are applied. *Younger*, 401 U.S., at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). As the Supreme Court has stated, "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injuction against good-faith attempts to enforce it. . . ." *Younger*, 401 U.S., at 54.

In addition, Justice Pincham has conceded that the rules are susceptible to a constitutional construction. Justice Pincham and his attorneys appeared before the Inquiry Board and urged that the rules "did not prohibit plaintiff's constitutionally protected January 31, 1987 Operation P.U.S.H. Community Forum Black History speech. . . ." (Amended Complaint at ¶ 28). Moreover, in his reponse to the defendants' motions to dismiss, Justice Pincham notes that the Rules "have not yet been construed, interpreted or applied" by the Courts Commission. (Plaintiff's "Answer" at 5). Therefore, the Court finds that there is no basis for concluding that the rules are totally incapable of a construction that does not violate constitutional rights.

Because, as noted in subpart V. B, the three components of the *Younger* analysis require abstention, and because no exception to *Younger* applies, this Court must abstain in favor of the state proceedings.

Rule 67(A)(2): "A judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions."

Rule 67(A)(4): "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice."

D. Ripeness

Both the Inquiry Board and the Courts Commission argue that this case is not ripe for adjudication. "[A] reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy." *Ohio Civil Rights Commission,* 106 S.Ct., at 2722, n.1 (citing *Steffel v. Thompson,* 415 U.S. 452 (1974)). In the instant case, the Inquiry Board has completed its investigatory function, has voted to file a complaint against Justice Pincham and has prepared a draft complaint. All that prevents the Inquiry Board from filing the complaint with the Courts Commission is the pledge that counsel for the Inquiry Board made to this Court to forbear from further action until the instant case was resolved. The Court holds in accordance with the principles set out in *Steffel v. Thompson* that this case is ripe for adjudication.

VI. CONCLUSION

For the reasons set forth above, the plaintiff's motion for impanelment of a three-judge court is denied. The plaintiff's motion to further amend his Amended Complaint by adding a federal voting rights claim in a second count is denied. The defendants' motions to dismiss this action under the abstention doctrine first articulated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), are granted. The Clerk is directed to enter judgment in favor of all the defendants and against the plaintiff.

ENTER:

/s/ ILANA D. ROVNER
ILANA DIAMOND ROVNER
United States District Judge

DATE: March 4, 1988

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-1592

R. EUGENE PINCHAM,

Plaintiff-Appellant,

v.

THE ILLINOIS JUDICIAL INQUIRY BOARD AND ITS MEMBERS, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 5058—**Ilana D. Rovner**, *Judge.*

ARGUED SEPTEMBER 26, 1988—DECIDED APRIL 27, 1989

Before COFFEY, EASTERBROOK and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge.* Justice R. Eugene Pincham appeals the district court's order dismissing a civil rights action Justice Pincham brought against the Illinois Judicial Inquiry Board, the Illinois Courts Commission and the members of both bodies under 42 U.S.C. § 1983. Justice Pincham claimed that ongoing proceedings in the Judicial Inquiry Board and the Courts Commission would deprive him of rights guaranteed under the First and Fourteenth Amendments of the United States Constitution. The district court's dismissal of Pincham's case rested upon the

principles of federalism and comity the United States Supreme Court enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). We affirm.

I.

Facts

This case arises from a speech Justice R. Eugene Pincham of the Illinois Appellate Court, First District delivered on January 31, 1987. The plaintiff-appellant's speech was given at an Operation P.U.S.H. Saturday Forum and, in the words of Pincham's First Amended Complaint, was "an unwritten contemporaneous speech commemorating Black History in America, celebrated during February-Black History Month." First Amended Complaint at ¶ 17. During Justice Pincham's speech, dealing with themes of racial unity and solidarity, he referred to a number of blacks and whites who were hanged in a 1741 New York slave rebellion and stated that "we are here on the shoulders" of those who died in that rebellion. In the last part of the speech Justice Pincham applied this theme to black candidates involved in mayoral races across the country, stating that "the black leaders are our candidates and they ride on our shoulders." After enumerating a list of these candidates, he focussed on the Chicago mayoral election, stating:

> "Harold Washington is running for mayor of the City of Chicago. And he got here on our shoulders. You've got to decide here and now whether or not your shoulders are broad enough to carry him in another time.
>
> * * * *
>
> And those of us who might be inclined to be traitors—you see, there is some who have slave mentalities—those of us who are inclined to be traitors who suspect that because you going to the secrecy of a voting booth that you can vote for who you want to vote for, we know who you are. And be not confused

about it. When the ballot comes out, we going to count. And 100 percent. Not 99 percent of the votes cast. Not 90 percent of the votes cast. *Any man south of Madison Street who casts a vote in the February 24th election who doesn't cast a vote for Harold Washington ought to be hung as those were hung in New York.*

* * * *

He rides on our shoulders and the movement. You see, we're not talking about an election. We're talking about a crusade. We're talking about a movement. We're talking about an emancipation. We're talking about lifting the mentality of—the slave mentality—of those who still have it."

(Emphasis added).

On February 23, 1987, the plaintiff-appellant received a letter from Robert B. Cummins, Chairman of the Illinois Judicial Inquiry Board, enclosing a copy of the speech and stating that:

"The Judicial Inquiry Board proposes charges that your participation in and remarks at the January 31 Forum constitute political activity in violation of Supreme Court Rule 62, Rule 67(2) and (4) and the introductory paragraph to Rule 61.[1]

* * * *

[1] The introductory paragraph of Supreme Court Rule 61 provides:

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe, high standards of conduct so that integrity and independence of the Judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Supreme Court Rule 62(A) states:

"A judge should respect and comply with the law and should conduct himself at all times in the manner that promotes public confidence in the integrity and impartiality of the judiciary."

(Footnote continued on following page)

> It is charged that your conduct in this regard constitutes willful misconduct in office and conduct that is prejudicial to the administration of justice and brings the judicial office into disrepute, in violation of Article VI, Section 15 of the Illinois Constitution."[2]

The letter also stated that prior to the Judicial Inquiry Board's determination of whether there was a reasonable basis to file a complaint against Justice Pincham with the Courts Commission, he was directed to appear and respond to the charges on March 13, 1987 at the Board's Chicago office.

Article VI of the Illinois Constitution creates the Judicial Inquiry Board and the Courts Commission and provides these agencies with the authority to resolve judicial disciplinary matters. The Judicial Inquiry Board is composed of two circuit judges, appointed by the Supreme Court, together with the governor's seven appointees, four non-lawyers, and three lawyers. Illinois Constitution, Art. VI, Sec. 15(b). After a finding of reasonable cause to believe that the conduct complained of is violative of Supreme Court rules is reached by five members of the Judicial Inquiry Board, a complaint can be filed with the Courts Commission. The Courts Commission consists of a justice of the Supreme Court, two justices of the Ap-

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[1] *continued*

Supreme Court Rule 67(A)(2) provides:

> "A judge may not, except when a candidate for office or retention, participate in political campaigns or activities, or make political contributions."

Supreme Court Rule 67(A)(4) states:

> "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice."

[2] Article VI, Section 15 of the Illinois Constitution establishes the Judicial Inquiry Board and the Courts Commission and provides them with the authority to discipline judges for the reasons including those set forth in the last paragraph of the quotation.

pellate Court and two Circuit Court judges. Concurrence of three members of the Courts Commission is required before disciplinary measures may be imposed upon a judge. The Illinois Supreme Court described the responsibilities of these respective bodies in the following manner:

> "The Courts Commission is the adjudicatory arm of the system of judicial discipline established by article VI, section 15, of our constitution. Section 15(e) vests the Commission with the authority to hear and determine complaints filed against judges by the Judicial Inquiry Board, which is the investigatory and charging arm of the disciplinary system and with the authority to impose sanctions for 'willful misconduct in office, persistent failure to perform [their] duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute.' (Ill. Const. 1970, art. VI, sec. 15(e).)"

People ex rel. Judicial Inquiry Board v. Courts Commission, 91 Ill.2d 130, 435 N.E.2d 486, 488 (1982) (citation omitted).

The decision of the Courts Commission in judicial disciplinary matters is final and a direct appeal of the Courts Commission decision through the Illinois court system is not provided within the statutes. Nonetheless, a party may commence indirect review of certain orders of the Courts Commission by requesting the courts to invoke their jurisidiction to issue writs of mandamus in cases where the Courts Commission has allegedly exceeded its constitutionally delegated authority, such as when the Courts Commission authoritively construes state statutes (rather than the Supreme Court rules it is responsible for enforcing). *See Harrod*, 372 N.E.2d at 65-66.

On March 13, 1987, the plaintiff-appellant appeared before the Judicial Inquiry Board, with counsel, and argued that his January 31 speech did not violate Supreme Court Rules 61, 62, 67(A)(2) and 67(A)(4). Further, Justice Pincham contended that if the rules were construed to prohibit his

speech they would be in violation of his right to free speech and his right to be free from vague restrictions on speech guaranteed under the First and Fourteenth Amendments to the United States Constitution. He urged that the Judicial Inquiry Board would thus be acting without a reasonable basis were it to file a complaint with the Courts Commission challenging his speech. Justice Pincham submitted a written memorandum of authorities to the Judicial Inquiry Board in support of his position.

In June 1987, the Justice filed an action in the district court seeking to enjoin the Judicial Inquiry Board and the Courts Commission from "filing or proceeding upon any Complaint against [Justice Pincham] premised upon [Pincham's] January 31, 1987 Operation PUSH speech."[3] Justice Pincham alleged that the Judicial Inquiry Board "intends to and will file a complaint with the . . . Courts Commission against [Justice Pincham] because of [Pincham's] PUSH speech which the . . . Judicial Inquiry Board will contend violated . . . Illinois Supreme Court rules."[4]

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[3] Complaint and First Amended Complaint, Prayer for Relief. Pincham filed his original complaint on June 5, 1987, and, on August 14, 1987, filed his First Amended Complaint, the document considered by the district court in ruling upon the motion to dismiss. The district court noted that copies of the Amended Complaint were circulated to the defendants on or about June 18, 1987, almost two months prior to the Amended Complaint's filing. *Pincham v. Illinois Judicial Inquiry Board*, 681 F. Supp. 1309, 1311 (N.D. Ill. 1988).

[4] Complaint and First Amended Complaint at ¶ 47. The district court's queries of counsel for the Judicial Inquiry Board confirmed Pincham's allegation that a complaint would be filed against Pincham in the Courts Commission. The district court noted that during its June 8, 1987, hearing on Pincham's request for a temporary restraining order, "counsel for the Inquiry Board informed the Court that the Inquiry Board had indeed determined to file a complaint with the Courts Commission." *Pincham*, 681 F. Supp. at 1320. However, the district court also noted that counsel for the

(Footnote continued on following page)

The Judicial Inquiry Board and Courts Commission moved to dismiss Justice Pincham's complaint, alleging that Pincham's action was not ripe for determination, because he had not yet been found guilty of a violation and disciplined. Furthermore, the Courts Commission and the Judicial Inquiry Board alleged that federal courts should not interfere with the ongoing state proceedings under the principles of federalism and comity enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and that abstention was required under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). *Pincham*, 681 F. Supp. at 1317-18. After the district court ruled that the case was ripe for adjudication, *Id.* at 1318, 1325, it dismissed the case on the basis of the *Younger* doctrine.[5]

In discussing the *Younger* doctrine, the district court specifically considered the analysis the United States Supreme Court had utilized in applying *Younger* in the attorney disciplinary area,[6] and concluded that this analysis was proper in the context of judicial discipline. *Pincham*, 681 F. Supp. at 1321-22. The district court enunciated the following questions to be considered in determining whether *Younger* abstention applies to Illinois judicial disciplinary proceedings:

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[4] *continued*
Inquiry Board pledged that the complaint would not be filed until the resolution of the district court proceedings had been resolved. *Id.* In a subsequent February 2, 1988, communication the Inquiry Board's counsel confirmed that the "Inquiry Board had voted to proceed with the action against Justice Pincham and that they were refraining from filing their now drafted complaint only because of the pledge made to this Court at the inception of this case." *Id.*

[5] *Id.* at 1318, 1320-24. In light of its view that *Younger* was controlling, the district court did not find it necessary to decide the *Pullman* abstention issue. *Id.* at 1318.

[6] *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 432 (1982).

"1) [D]o judicial disciplinary hearings within the constitutionally prescribed jurisdiction of the Inquiry Board and the Courts Commission constitute an ongoing state judicial proceeding[?]

2) [D]o the state judicial disciplinary proceedings implicate important state interests[?]

3) [I]s there an adequate opportunity for Justice Pincham to raise his constitutional challenges in the state disciplinary proceedings[?]"

Id. at 1322.

The district court concluded that each of these three requirements were met, and found the Courts Commission to be, in effect, an "independent state court, established by the Illinois Constitution for the express purpose of adjudicating judicial discipline cases," *Id.* at 1323, and a proper recipient of abstention under *Younger*. Proceedings in the Courts Commission were in progress and "ongoing" as the Judicial Inquiry Board had previously voted to file a complaint with the Courts Commission. *Id.* at 1322. With respect to the second question, the district court reasoned that the "state's interest in assuring the integrity and professional conduct of its judiciary is certainly at least as important as its interest in assuring the professional conduct of the attorneys it licenses." *Id.* at 1323. The district court also ruled that "based upon its review of the Rules of Procedure of the Courts Commission as well as [its] findings with regard to the Courts Commission's state constitutional authority, . . . the Courts Commission will hear and resolve Justice Pincham's constitutional claims." *Id.* at 1324.

The district court, after reviewing the record, also found that the involved facts and circumstances could not reasonably be interpreted as an exception to the application of the *Younger* doctrine. Since the proceedings were not initiated merely for the purpose of discouraging the exercise of protected rights, the court reasoned that the proceedings were neither brought in bad faith nor to harass

Justice Pincham. *Id.* Justice Pincham's allegations of selective prosecution also fell short of providing a basis for a finding of bad faith or harassment, as they failed to specifically compare Pincham to others who had been involved in public speaking. *Id.* Because Justice Pincham had himself argued that the Supreme Court rules could be construed harmoniously with the exercise of protected rights, the exception to *Younger* for laws which are flagrantly and patently unconstitutional also did not apply. *Id.* at 1325. The district court in its application of the *Younger* doctrine dismissed the plaintiff-appellant's complaint without reaching the merits of the constitutional issues.[7]

II.

Application of the Younger Abstention Doctrine

We agree with the district court that the Supreme Court's decision in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), sets forth the appropriate analysis when determining whether or not *Younger* required the district court to abstain from interfering with the judicial disciplinary proceedings. In *Middlesex*, 457 U.S. at 432, the Supreme Court held that, in acertaining whether to abstain from interfering with state attorney disciplinary proceedings:

> "The question . . . is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*,

[7] Although Pincham cited 42 U.S.C. § 1981 in his complaint, apparently alleging racial discrimination, the district court determined that Pincham abandoned this claim by failing to argue it in his response to the motions to dismiss. 681 F. Supp. at 1312 n.2. The district court also rejected Pincham's attempt to amend his complaint to allege violations of federal voting rights statutes, 42 U.S.C. §§ 1971(a), 1973(a), and 1973i(b). *Id.* at 1314-17. Pincham does not raise either of these issues on appeal.

do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges."

Our first inquiry, then, is whether the district court properly concluded that the proceedings against Justice Pincham were ongoing state judicial proceedings. *See* 681 F. Supp. at 1322. As our previous discussion made clear, Justice Pincham has presented a legal argument in response to the Judicial Inquiry Board's proposed charges and the Inquiry Board has informed the district court "that the Inquiry Board . . . . indeed determined to file a complaint [against Justice Pincham] with the Courts Commission." *Id.* at 1320. Under these facts the state proceedings against Justice Pincham are "ongoing." In addition, the Courts Commission, the body that will hear the charges to be filed against Justice Pincham, is "judicial in nature," as it is a duly constituted entity that exercises the coercive responsibility of ruling upon alleged violations of Illinois Supreme Court rules subject to procedural limitations like those found in courts. *See* 681 F. Supp. at 1318-20, 1323.

Our conclusion that the proceedings against Justice Pincham are "ongoing" and "judicial in nature" finds support in the United States Supreme Court's decision in a similar case, *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 623-25, 626-29 (1986). In *Dayton Christian Schools*, an administrative agency conducted an investigation of the Dayton Christian Schools' personnel practices, and filed a complaint initiating a formal administrative proceeding against the school. Here, as in *Dayton Christian Schools*, the Judicial Inquiry Board conducted an investigation and has decided to file a complaint against Justice Pincham with the Courts Commission. In both cases the formal proceedings commenced are coercive rather than remedial, as the imposition of back pay liability was possible in *Dayton Christian Schools* and judicial discipline may be imposed in this case. The Supreme Court in *Dayton Christian Schools* relied in particular upon the "coercive" rather than "remedial" nature

of the involved proceedings,[8] in holding that *Younger* required a federal district court to abstain from interfering with state civil rights proceedings that were "ongoing" and "judicial in nature." The proceedings against Justice Pincham, like the proceedings in *Dayton Christian Schools*, are "ongoing," and are even more clearly "judicial in nature," because they take place before a duly constituted body composed of state court judges rather than before an administrative agency.

We also agree with the trial court that the state judicial disciplinary proceedings brought against Justice Pincham involve the important state interest of preserving a fair and impartial judiciary. *See* 681 F. Supp. at 1323. As the trial court observed: "A state's interest in assuring the integrity and professional conduct of its judiciary is certainly at least as important as its interest in assuring the professional conduct of the attorneys it licenses." *Id. See also Coruzzi v. New Jersey*, 705 F.2d 688, 691 (3d Cir. 1983) (Recognizing important state interest in state judicial removal procedures). Indeed, the state of Illinois must be permitted to pursue its vital interest in preserving a fair and impartial judiciary capable of maintaining the respect of its citizens through the avenue of judicial disciplinary proceedings.

Although we have determined that the judicial disciplinary actions brought against the plaintiff-appellant constitute ongoing state judicial proceedings that pursue a vital state interest, application of the *Younger* abstention doctrine would still not pass muster unless the plaintiff-appellant has the opportunity to raise his constitutional challenges in the state judicial proceedings. *See Middlesex*, 457 U.S. at 632. "[T]he burden . . . rests on [Justice Pincham] to show 'that state procedural law bar[s] presentation of [his constitutional] claims.' " *Pennzoil Co. v. Tex-*

[8] *See Dayton Christian Schools*, 477 U.S. at 627-28 n.2 (citing "coercive" rather than "remedial" nature of state proceedings as a factor supporting abstention).

aco, Inc., 107 S. Ct. 1519, 1528 (1987) (quoting *Moore v. Sims*, 442 U.S. 415, 432 (1979)). As the Supreme Court further observed in *Pennzoil*:

> "We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary."

107 S. Ct. at 1528 (citation omitted).

Justice Pincham, in an attempt to meet his burden of demonstrating the unavailability of a state forum to determine his constitutional claims, cites Illinois Supreme Court precedent that allegedly precludes the Courts Commission from resolving the constitutional questions which might be presented by the application to Justice Pincham of the Supreme Court rules. In *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill. 2d 445, 372 N.E.2d 53, 65-66 (1977), the Illinois Supreme Court determined that the Courts Commission lacked authority to independently construe an Illinois statute. The court stated:

> "[T]he judicial power in this State is vested solely in the courts. This power includes, among other things, the authority to judicially interpret and construe constitutional provisions and statutes when necessary. Inasmuch as the Commission is not a part of the tripartite court system in this State, it possesses no power to interpret statutory ambiguities or to compel judges to conform their conduct to any such interpretation. This limitation is particularly dictated insasmuch as this court is without the authority to review the correctness of the Commission's orders. . . . To grant the Commission such authority would interfere with an independent judicial system and would place trial judges in an untenable position. If, as here, the statutory interpretation of the Com-

> mission differed from that of the appellate courts, trial judges who followed, as mandated, the guidance of the courts of review, would be subject to sanction by the Commission. The 'framers of the constitution sought to promote certainty and uniformity in the interpretation and declaration of the law. To that end they committed the exercise of these judicial functions to the judicial department.' *People v. Bruner*, (1931), 343 Ill. 146, 159, 175 N.E. 400, 405.
>
> The function of the Commission is one of fact finding. Its function in this case was to apply the facts to the *determined* law, not to determine, construe, or interpret what the law should be."

372 N.E.2d at 65-66 (citations omitted, emphasis in original).

The Illinois Supreme Court has tempered its determination in *Harrod* with a subsequent decision in *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 435 N.E.2d 486, 488-89 (1982). In that case the court rejected the argument that the Courts Commission lacked the authority to interpret the Supreme Court rules it applies in disciplinary proceedings. The court stated:

> "The Courts Commission is the body with the constitutional responsibility for applying the Rules of Judicial Conduct to particular cases. We conclude that its constitutional authority to hear and determine disciplinary cases necessarily includes the power to interpret the rules it applies in deciding cases before it.
>
> * * * *
>
> It is . . . established that the law which the Commission is to apply in deciding disciplinary cases is the supreme court rules.
>
> The issue, then, is whether the Courts Commission, in the exercise of its duty to apply the rules of judicial conduct to the case before it, has the authority to construe the rules. We conclude that it does. The Commission's function is adjudicative, and inter-

> pretation of the legal rule the tribunal is applying is an inherent and inescapable part of the adjudicative process.
>
> * * *
>
> This conclusion is not inconsistent with *Harrod's* holding that the Commission does not have the authority to make an independent interpretation of a statute which has been given a different interpretation by a court. Since the Commission is the tribunal with final responsibility for applying the rules of judicial conduct to disciplinary cases, there is no possibility that its interpretation of a rule will be at odds with an interpretation by a court. Thus the possibility referred to in *Harrod* of conflicting interpretations creating a dilemma for trial and appellate judges does not arise."

435 N.E.2d at 488-89 (citation omitted). The Illinois Supreme Court in *Judicial Inquiry Board*, thus, made clear that the reason for *Harrod*'s limitation upon the Courts Commission's authority to construe statutory provisions is the need to prevent the possibility of conflicting constructions of substantive law in decisions rendered by the Courts Commission and the Illinois courts. In *Judicial Inquiry Board*, the Illinois Supreme Court recognized that this conflict in all probability will not arise in cases where the Courts Commission is called upon to interpret Supreme Court rules, because, subject to the limited exception of a mandamus action, the Courts Commission has the ultimate "responsibility for applying the rules of judicial conduct to disciplinary cases,"[9] which means that its interpretation of a rule will usually be final and, thus, not in conflict with a court's interpretation of a rule. *See* 435 N.E.2d at 489.

As we previously emphasized, "when a litigant has not attempted to present his federal claims in related state

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[9] 435 N.E.2d at 489.

court proceedings, a federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary." *Pennzoil*, 107 S. Ct. at 1528. The record in this case fails to reflect facts that tend to demonstrate that the Courts Commission would decline to entertain the constitutional questions Justice Pincham might conceivably present. *See Pincham*, 681 F. Supp. at 1322, 1324. Indeed, the Courts Commission has considered a constitutional challenge to the application of the Supreme Court rules to a judge on at least one previous occasion. *See In re Elward*, 1 Ill. Cts. Comm. 114, 117-20 (1974). *See also* P. Wassenberg, *A Search for Accountability: Judicial Discipline Under the Judicial Article of the 1970 Illinois State Constitution*, 8 Northern Illinois University Law Review 781, 798-99 (1988) (discussing *Elward* and Courts Commission construction of constitutional questions).

We recognize that *Harrod* raises some question concerning the Courts Commission's authority to entertain constitutional challenges. We emphasize, however, that Justice Pincham's case differs from *Harrod*. In ruling upon Justice Pincham's case the Courts Commission is called upon to address legal questions arising from the rules it is charged with enforcing, rather than rules over which it exercises no authority. Yet, this case also differs from *People ex rel. Judicial Inquiry Board v. Courts Commission*, 91 Ill. 2d 130, 135 N.E.2d 486 (1982) in that the Courts Commission is required to do more than simply interpret the meaning of a Supreme Court rule. In this instance, the Courts Commission would be construing the constitutionality of Supreme Court Rules, over whose application it exercises exclusive jurisdiction. Because Illinois state courts are barred from applying the Supreme Court Judicial Disciplinary Rules, we are convinced that the Courts Commission's rulings on constitutional issues in this limited area would not conflict with those of the courts. Based upon the foregoing discussion, we are confident that the Illinois courts would in all probability construe their constitution so as to permit the Courts Com-

mission to consider federal constitutional mandates when interpreting the Supreme Court rules during the course of a judicial disciplinary proceeding. *Cf. Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 629 (1986) ("[E]ven if Ohio law is such that the Commission may not consider the constitutionality of the statute under which it operates, it would seem an unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles"). Thus, we are convinced that Justice Pincham has failed to present the "unambiguous authority" that Courts Commission proceedings would provide an inadequate forum for his constitutional claims that is necessary to preclude abstention under *Younger*. *See Pennzoil*, 107 S. Ct. at 1528-29.

III.

Application of Exceptions to the Younger Doctrine

We must next determine whether the complaint sets forth an exception to the *Younger* doctrine. *See Jacobson v. Village of Northbrook Municipal Corp.*, 824 F.2d 567, 569-70 (7th Cir. 1987). In *Jacobson*, 824 F.2d at 569-70, we held that *Younger* does not require that a federal court abstain from enjoining a state proceeding if

> "(1) the 'state proceeding is motivated by a desire to harass or is conducted in bad faith,' *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611, 95 S. Ct. 1200, 1212, 43 L. Ed.2d 482 (1975); (2) there is 'an extraordinarily pressing need for immediate equitable relief,' *Kugler v. Helfant*, 421 U.S. 117, 124-25, 95 S. Ct. 1524, 1530-31, 44 L.Ed.2d 15 (1975); or (3) the 'challenged provision is flagrantly and patently violative of express constitutional prohibitions,' *Moore* [*v. Sims*, 442 U.S. 415, 423, 99 S. Ct. 2371, 2377 (1979)]."

Justice Pincham does not argue that the state judicial disciplinary action was brought against him either with the desire to harass him, much less in bad faith. As we

stated in *Collins v. County of Kendall*, 807 F.2d 95, 98 (7th Cir. 1986):

> "A plaintiff asserting bad faith prosecution as an exception to *Younger* abstention must allege specific facts to support an inference of bad faith. 'The *Younger* rule, as applied in *Hicks* [*v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281, 45 L.Ed.2d 223 (1975)], requires more than a mere allegation and more than a "conclusory" finding to bring a case within the harassment exception.' *Grando Corp. v. Rochford*, 536 F.2d 197, 203 (7th Cir. 1976). This specific evidence must show that state prosecution 'was brought in bad faith for the purpose of retaliating for or deterring the exercise of constitutionally protected rights.' *Wilson* [*v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979)]."

We agree with the district court that Justice Pincham has failed to establish, either in his pleadings or his argument, that the Judicial Inquiry Board and Courts Commission "were 'using or threatening to use prosecutions, *regardless of their outcome*, as instrumentalities to suppress speech.' " *Collins*, 807 F.2d at 101 (quoting *Sheridan v. Garrison*, 415 F.2d 699, 706 (7th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) (emphasis in original)). *See Pincham*, 681 F. Supp. at 1324. We are also in agreement with the trial court that Justice Pincham's allegations of selective prosecution "are sketchy at best and clearly insufficient to make the requisite showing of bad faith or harassment." *Id.* Even if we accept Justice Pincham's allegation that other judges engaged in activity equivalent to his and were not disciplined, we refuse to conclude that there was "bad faith" absent allegations that the state agencies had some awareness of the other judges' activities and treated them more favorably than Justice Pincham as part of a campaign that used prosecutions, regardless of outcome, to suppress speech. Justice Pincham does not make such allegations.

An "extraordinarily pressing need for immediate equitable relief" is a second possible exception to *Younger*. *Jacobson*, 824 F.2d at 570. Justice Pincham argues that the threat of self-censorship resulting from the enforcement of this ordinance justifies immediate equitable relief and cites *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 179-80 (3rd Cir. 1987), in which the Third Circuit applied this exception in granting a preliminary injunction preventing the closing of an alcoholic treatment center in an equal protection based challenge to a zoning ordinance. However, *Younger* itself disposes of Justice Pincham's argument in this case. In *Younger* it was determined that "a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." 401 U.S. at 51. The mere presence of "political speech" has no effect upon this analysis. Because Justice Pincham alleges nothing more than that a single state judicial disciplinary proceeding has had a "chilling effect" on his free speech rights, he has failed to establish that "extraordinarily pressing need for immediate equitable relief" required before coming within the purview of this exception to the *Younger* doctrine. *Compare Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (An exception to *Younger* applies where "three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time").

The final exception to *Younger* occurs in a case in which the challenged provision is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). However, "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith efforts to enforce it." *Id.* at 54. As the district court noted, Justice Pincham himself "appeared before the Inquiry Board and urged

that the rules 'did not prohibit [his] constitutionally protected January 31, 1987 Operation P.U.S.H. Community Forum Black History Speech.' " 681 F. Supp. at 1325 (quoting Amended Complaint at ¶ 28). Further, our examination of the rules Justice Pincham challenged reveals that they do not inherently prohibit constitutionally protected speech. Thus, the Courts Commission could well construe the rules in a manner compatible with the constitution. In these circumstances Justice Pincham's allegations are insufficient to satisfy a facial challenge to these rules, and certainly do not establish that the rules are flagrantly and patently unconstitutional.

Because *Younger* required the district court to abstain from enjoining the state judicial disciplinary proceedings brought against Justice Pincham, the district court's dismissal of Justice Pincham's complaint is

AFFIRMED.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX C

Appendix C

OPERATION PUSH SATURDAY FORUM
SPEAKER: R. EUGENE PINCHAM
JANUARY 31, 1987

R. EUGENE PINCHAM: First I want to say to all of those in the radio listening audience, in the beauty parlors and barber shops and in the restaurants, to take a moment of your time and call at least three people and tell them to turn on the radio to Operation Push. When you do that, you increase our listening audience. When you do that, you broaden our base. When you do that, you improve our awareness and you increase our concern. So turn to your telephone and dial three people and ask them to turn their radios on and listen to Push.

Second, to Rev. Barrow, Rev. Reddick, Senator Brookins, and my colleague, Judge Holt, Rev. Jackson and Ben Chaffers. I just feel tremendously honored just to be in the company, the presence, of a man like Ben Chaffers. He is one of the soldiers who has given his all for the struggle, and we want you to know that there are those of us who remember. There are those of us who appreciate you and are aware of your contribution. We say thank you.

Next, I want to say I appreciate the invitation to be here this morning to share a few of my thoughts with you. I feel at home here because this is where the heart of the struggle is. I'm glad to be here to continue to do God's work. Rev. Barrow, there is a new radio-TV commercial that's on the air now and that commercial says "the best part of waking up is some coffee in your cup." Now that's a lie. That's not true. The best part of waking up is waking up, and I'm glad to be here.

Another thing I want to say is that when we do this building remodeling, the first thing we are going to ask the

reverend to put in here is a podium. I'm going to talk directly to the architect and see if we can't get a podium up here that will accommodate what we're trying to do up here. The best part of waking up is waking up.

Next, I want to say there are some of you out there in radio land—of course, there's no such person here in Push this morning—who still is not a registered voter. There are still some people out there who are too embarrassed, too ashamed, too afraid, too ignorant to register to vote. To those of you out there who are in that category, you can minimize exposure of your ignorance and your stupidity by realizing that you cannot vote in the February 24 primary if you're not registered to vote; but you still can go downtown and register up to March 9 to vote in the mayoral general election. You will not be embarrassed because nobody will know you've been down there. You can sneak in. I know you don't want anybody in the community to know that you're not a part of the struggle by registering to vote and that you're ashamed, so one day when you're downtown between now and March 9, 1987, go to the Board of Election office, sneak in, hide your face and register to vote in the mayoral primary, which will be April 7, 1987.

There's still hope for you. You still have a chance. We are reasonably certain the Lord is not going to strike you dead because you haven't registered to vote, providing you register by March 9, 1987.

Next, I want to say to those in radio land, to the lawyers, to the teachers, the dentists and the doctors, the firemen, the police, the secretaries and the plumbers and electricians, the carpenters, the high falutin, the hoity-toity, to the bourgeoisie out there, the office workers, the factory workers.

Let me back up a minute because I too fit every qualification for being bourgeoisie. So, to those of you out there who think you are on top, understand that you didn't get there by yourself. You got there on sombody else's shoulders. You

got there on Ben Chaffer's shoulders, and you owe it to others to participate and contribute to this struggle. The truth is, all of us are in the same soup line. It just happens that some are closer to the counter than others. We've got to stop this nonsense of thinking that because we've had a paycheck regularly for the last ten years, that we are on top. We are just a little further from the counter in the soup line. We've got to reach up and give those a helping hand that need our aid and assistance.

Now, I really didn't come here to arouse your emotions this morning. There is not going to be any shouting in here today. I came here to enhance your awareness. I didn't come here to make you feel good. I came here to make you feel informed. I didn't come here to excite your heart but to inspire your mind. There is not going to be any shouting in here today. When you shout, you are shouting because you are emotional. I'm not opposed to shouting. I do it sometimes myself. But I first want to be informed before I become emotional. So I didn't come here today to shout.

Tomorrow, February 1st, is the beginning of Black History Month in America. Tomorrow, February 1st is the beginning of Black History Month in America. The first thing we need to do about that is to change the name. We need to change the name from Black History Month to Afro American History Month. We ought to call it what it is. You see, there is no such thing as a White History Month. If the Irishmen and the Scotch and the English and the French and the Italians and the Greek and the Polish, if they decided they were going to have a White History Month, we would be the first to say we don't approve of that.

But when we change the name to what it ought to be and call it an Afro American History Month, there are going to be some who are going to say, "Well there are some white folks in Africa, too, but they are not the ones who came to America, so we know we're not taking about them."

So we first ought to begin to call it what it is, Afro American History Month. Now, to celebrate Afro American History Month, Senator, demands an awareness of history and a sensitivity to our past. Years ago when I was being reared down in Alabama, just a small tot, we used to go out into the fields with our relatives. One of my relatives was a lady by the name of Ada, Cousin Ada. She was as close to me as a mother. Down home, in those days, a family was a close knit unit. Cousins were like sisters and cousins were like brothers and aunts were like mothers.

We would go out into the field, in the cotton field, and I would walk behind her as she did her rows. Being only three or four years of age, I would get tired before the sun rose in the sky. Get hot. And I would say to Cousin Ada "Ada, tote me. Ada, tote me." And Cousin Ada would say "Let me finish this row and I will tote you."

Of course, I was asking her to carry me. When Ada would get to the end of the row, she would put me on her shoulders, my feet around her neck, and with one hand she would hold my two feet and two hands in her hand and she would walk me to the edge of the cotton field which bordered the woods. There she would clean out an area and lay me down where I could go to sleep. And she would say to me, when I would say, "Well I'm scared, Ada, to be here", she would say, "Well, God will look after you." Then she would go back out in the field.

I'm now a justice of the Appellate Court of Illinois because Ada toted me. I didn't get here on my own. I'm still riding on her shoulders. You see, we Afro Americans must be aware that we got here on somebody else's shoulders. We need to be aware of history. History is a word. In fact, it is two words. His story. His story.

And so it is I'm going to take just a few moments of your time this morning to talk about our story. Our story. Paul Finkleman has authored a book entitled *Slavery In The*

Courtroom. Slavery In The Courtroom. Of course it attracted my attention because I am in the courtroom. The book is an annotated bibliography of American cases of slavery in the courtroom. Wouldn't you know, Sandy, it's Published by the Library of Congress, 1985, and that gives it a certain authenticity. If I wrote it, the first thing folks would say, "It didn't happen. That's just R. Eugene Pincham talking." But the Library of Congress put it out.

During slavery, the slave master attempted to philosophically justify slavery by contending that blacks were inferior and that he was doing the black a favor by bringing him from Africa to America to feed him. The slave master attempted to convey the thought that slaves were happy being slaves.

Now there may have been some happy slaves but not all of them were happy. The fact of the matter is, some were so unhappy that they revolted. We haven't been told too much about the revolts. We know about the Stoner rebellion in 1739 in South Carolina. We know about the Nate Turner rebellion of 1831 in Virginia. But in fact the Stoner rebellion and Nate Turner rebellion were not even written and recorded at the time they occurred.

There was another great slave rebellion in New York, in New York in 1741. Most of us didn't even know that there were slaves in New York, in the Big Apple. But New York has its history about slavery and the rebellion occurred in 1741.

The City of New York between March 17 and April 6 of 1741 became engulfed in a series of fires. There were ten fires in a single week. There were four fires in a single day. One of these fires destroyed much of the city and destroyed a good portion of Fort George. Fort George was the seat of the Colonist government. Fort George was the residence of the governor. That fire occurred on March 18, 1741.

Simultaneously with these fires there were...

The officials believed the fires were part of a large plot by slaves, Spanish agents, captured Spanish seamen, and a few greedy whites to overthrow the city in a general slave rebellion. While attempts were being made to put out the fires on April 6, 1741, a slave was seen running from a burning building; and when you see us running, it always alarms other folks. An alarm went out that the Negroes had arrived and were going to burn down New York.

This cry combined with other events led to mass arrests and trials of slaves in New York. As early as March 1st a slave was arrested for theft. That same week a white woman known as Peggy was also arrested. Peggy was notorious for prostitution and consorting with the black slaves. She was charged with aiding in the theft of silver items and other goods.

It was not until the fires of March and April, however, that the officials in New York connected the fires with the robberies and the thefts. On April 8, 1741 a white tavern owner and his wife—his name was John and her name was Sara—their last name was Hughson, H-U-G-H-S-O-N. John and Sara Hughson were arrested and charged as accessories to felonies and misdemeanors. The prostitute, Peggy, had rented a room from the Hughsons and it appeared that they were connected to numerous robberies and the fires.

On April 11, the common counsel of New York met and concluded that the recent fires were occasioned and set by some felonious confederacy of latent enemies and slaves, and for that reason two more slaves were arrested on April 13th and another on the 17th.

A grand jury met on April 12 to consider the fires and the robberies. It also met to consider the legal selling of liquor to slaves. The grand jury began to examine witnesses on April 23. The prostitute, Peggy, had been in jail for almost two months, and although she was given a chance to turn states evidence with a promise of a recommendation to the

governor for a pardon, Peggy positively denied knowing anything about the fires or about any slave rebellion.

On April 24 the Hughsons and Peggy and two slaves were indicted and their trials were set for the following day. However, their trials were postponed until May 1st and on that date the two slaves were tried and convicted. The trials resumed May 6th and the Hughstons were convicted of receiving stolen property.

On May 11th the first two slaves convicted of robbery were hanged while wearing their chains. I'm reading now from *Slavery In The Courtroom*. The next day the Hughsons and Peggy the prostitute were brought to trial on the new charges of conspiracy, confederating and consorting with slaves to rebel and to burn the city of New York. From that date until August 31st, the city saw a long series of arrests, trials and executions. Ultimately 20 whites and 154 black slaves were arrested. Four of the whites—the Hughsons, Peggy, and a purported Catholic priest—were hanged.

John and Sara Hughson owned a white indentured slave. Her name was Mary Burton. It was because she informed on John and Sara Hughson that they convicted and hanged John and Sara Hughson. The common counsel of New York appropriated a reward for this white indentured servant of John and Sara Hughson. They appropriated an award for Mary Burton. But Mary Burton never got the reward because it was used to buy her indentured contract from the Hughsons. And so it was, she became a stool pigeon against her master for nothing.

Seven other whites were discharged or pardoned on the grounds that they be compelled to leave the jurisdiction, but the slaves faced a worse fate. Thirteen slaves were burned to death at the stake and another 18 were hanged. 17 were transported out of the colony, most of them going to the Caribbean islands to work on the sugar plantations where their life expectancy would be short. Most of the slaves might

have been executed or imprisoned had existing facilities allowed it, but the jails overran. Slaves were confessing to their guilt in hopes of pardons and others were pardoned for some things that they had not done, in order to get evidence against others. The jailors feared, considering the season of the year, that the numbers in the jails closely confined might breed an infection, and thus 41 were chosen for transportation out of the colony.

That same day, however, another black was taken from the jail and sentenced to die and hanged all within one day. He was burned to death and the hangman, raised up his legs, laid it upon the fire and with the man screaming for his life, he named out some other slaves who he said were also in this conspiracy plot. Later that evening those slaves were arrested.

The last burning at stake took place on July 18 but blacks were hanged in New York as late as August 15, 1741, arising out of the slave rebellion. The daughter of John and Sara Hughson was also convicted and she turned states evidence to save her life.

There was a white man in New York by the name of John Yurie who was indicted for conspiring with the slaves to rebel. The prosecution argued that Yurie was a priest, that he had baptized the Hughsons, that he had also baptized the prostitute, and that he told the Negroes that he would forgive them of their sins if they rebelled. The white man Yurie never admitted that he was in fact a Catholic or a priest. Others testified that he was. Some of the most damaging testimony came from the daughter of John and Sara Hughson.

John Yurie was convicted on August 29 three weeks after he commenced trial and he was hanged the following day, five weeks after his trial began.

And so it is Push, Afro American history, we are here on the shoulders of Peggy the prostitute. We are here on the shoulders of Sara and John Hughson, who aided and assisted us in our efforts for freedom at the cost of their lives. We

are here on the shoulders of John Yurie. And we are here on the shoulders of hundreds of unnamed slaves, who were hanged and burned alive at the stake in the New York rebellion.

We did not get here alone. We did not get here by ourselves. The civil war ended slavery, as you know, but, Judge Holt, it didn't end slave mentality. There is still slave mentality prevailing in Chicago today. It's unfortunate that that is so, but it is.

The last two Wednesday evenings at 9:00 o'clock on Channel 11 there was a television program, Eyes On The Prize. We ought to give credit where credit is due for that title. That title, Eyes On The Prize, originated right here at Push by Rev. Jessie Jackson. These two television series that went on for one hour from 9:00 to 10:00—and I tried to tape it but I can't work that thing. I just can't work that thing. I have to call Scooter to help me do that, but he was not at home. I'm going to get the tape.

These two tapes was telling us about the civil rights movement and, quite frankly, it told us some things that we had forgotten. It told us some things we need to be reminded of. In 1954 Dr. King had completed his courses for his PhD at Boston University, in the school of theology. He had been offered several jobs to teach but he chose instead to accept the pastorship of the Dexter Avenue Baptist Church in Montgomery. Dr. King succeeded a pastor there whose name was Vernon Johns. Rev. Vernon Johns had a brilliant record of protesting segregation in Montgomery.

During Dr. King's first year as pastor at Dexter Avenue Church, he finished his dissertation on his PhD., Dr. King's dissertation was entitled, A Comparison Of The Conceptions of God In The Lives of Paul Tillett and Henry Nelson Wein. Dr. King received his PhD in 1955 from Boston University.

Rosa Parks. I asked the question in my own home when they showed this program on Channel 11. What year was it

that Rosa Parks refused to get up off that bus? As brilliant as I am, I had forgotten the year. It was on December 1st, 1955 that Rosa Parks refused to get up and give her seat to a white man. Rosa Parks was a seamstress but she was also an ardent NAACP worker; and when she refused to get up and give her seat—and, quite frankly, folks, I really don't think that the nation has given her her dues.

Now, let me just tell you something. Dr. King was chosen to lead the bus boycott, not because he was brilliant. In fact, the people in Montgomery didn't know how much sense he had. He hadn't been there long enough. He was chosen not because he had oratorical skills, although he had them, but the people didn't know about them. He hadn't been there long enough. He was chosen not because he had a nonviolent philosophy. The people didn't know he had a nonviolent philosophy.

He wasn't chosen because he loved people. There were a lot of people in Montgomery that loved people. Dr. King was chosen by the people in Montgomery to lead the Montgomery bus boycott for a reason, and that reason was because he hadn't been in Montgomery long enough to have been tarnished by the power structure. Dr. King was chosen because he hadn't been there long enough to have been spoiled to become a bourgeoisie Baptist preacher. That is why he was chosen. Dr. King was chosen because he hadn't been spoiled by ambition or eliminated a concern for the people. That's why Dr. King was chosen. In other words, Dr. King was clean. That is why he was chosen.

I'm going to come back to Dr. King in just a few minutes. Daisy Bates. Daisy Bates in 1941, she and her husband founded and published a black weekly newspaper in Arkansas. It was called the Arkansas State Press.

Daisy Bates was an ardent NAACP worker. As a matter of fact, Daisy Bates stood up to the president of the United States of America. She told Dwight D. Eisenhower, who had

been the commander of the European forces in World War II, she told Dwight Eisenhower, "I will not re-enroll these nine children back at—What's the name of the school?—Central High in Little Rock—Central High School—until you send the troops down here to protect us." She stood up and said "I'm willing that the black folks ride on my shoulders." She said "Mr. President, send the troops. Otherwise we will not re-enroll."

And indeed the troops were sent. Those nine children, nobody really can fully explain the fear, the animosity, the apprehension, the anxieties that must have been entertained in their little young hearts. They were doing something, Rev. Barrow, that all black folks wouldn't do. They were insulted. They were called wild, vicious names. Soldiers were standing there with bayonets, with racists, bigots, threatening to murder children.

But they walked tall. They said "My shoulders are broad." They said that "There's going to come a judge who will ride on my shoulders and he will go to the Appellate Court and he'll come back and tell that he got there on my shoulders." Those nine children and Daisy Bates. James Meredith— James Meredith in 1961 enrolled at the University of Mississippi. Riots broke out. 37 people were injured. Two people were killed. James Meredith walked tall. Two years under guard he went to school until he got his degree in 1963. We can never fully appreciate what that man went through, but we know we're here today because his shoulders were broad.

Now let me get back to Dr. King. I'm going to take my time this morning. I'm going to take my time. We shouldn't forget that the highest law enforcement agency in America, the FBI, attempted to denigrate Dr. King. They tried to undermine our confidence in Dr. King. They lied on Dr. King and they vilified him and deprecated his name. In Senate testimony in 1975 the FBI acknowledged that for six years it tried to discredit Dr. King. Under the directorship

of J. Edgar Hoover, the FBI sent Dr. King anonymous threatening letters, lies about his sexual life and lies about what he had been doing, in an effort to induce Dr. King to commit suicide. The FBI admitted it had tried to prevent Dr. King from being awarded the Nobel Peace Prize. The FBI admitted that it tried to prevent him from meeting with the Pope. The FBI admitted it attempted to intimidate and to threaten people from cooperating to cut off his financial support for the SCLC, and many FBI agents and high officials in the FBI openly rejoyced when Dr. King was assassinated.

Now we are celebrating his birthday as a national holiday. An article appeared in the New York Times on Thursday, January 15, 1987. The article is written by Edward Oldshaker. Edward Oldshaker is one of our white brothers. You see, if I said it, you would get mad at me for saying it. But I'm going to tell you what Oldshaker, the white brother, says about what we're doing regarding Dr. King's holiday. I support the holiday but it ought to be put in its perspective. Here's what Oldshaker says and I'm going to read it slowly. I'm going to take my time and read it to you. It's in one of the most renowned journals in the world, the New York Times. They don't come more prestigious than the New York Times. When somebody writes something and it's published in that newspaper, it's heavy.

> Listen to what Oldshaker says. "The tributes to Dr. King whose chief goal at the time of his dream was to end poverty. These tributes are painfully ironic when viewed alongside the harsh facts about the growing numbers of poor and powerless in this country.
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> If there's one commodity in which we're rich, it's symbolism. The holiday honoring Dr. King, however noble intentions of its originators, effectively masks the failures of social programs with a display of well chosen words. We refrain from dealing responsibly and immediately with the still urgent issues that Dr. King tried to address. Rather, we have preferred to put on a good

show that's centered on praising his dream, a vision we are comfortable praising because we can hold it perpetually distant, frozen indeed in that 1963 speech of Dr. King.

Today Dr. King is manageable. His challenge to the nation to live up to his Judeo-Christian ideas and democratic principles is long gone. Now we have him where we want him, on a pedestal carved in stone, ideal and conveniently unthreatening. Dr. King was not so popular when he was alive and during the final months of Dr. King's life he was under attack not only from his usual enemies but he was under attack also from young black militants for his adherence to nonviolence. He was under attack by the FBI for his position on Viet Nam.

Dr. King proceeded to attract even harsher criticism by announcing plans for a protracted nonviolent poor peoples campaign in Washington. He declared that the slow, silent violence of poverty was so brutal that it justified a large design to cause major massive dislocation in the nation's capital.

Each year that we continue to celebrate Dr. King's birthday in our sentimental way, we further obscure and forget the true nature of his work. At the time of his murder on April 4, 1968, Dr. King was still a thorn in the side of the power structure and the establishment. His fiery oratory emphasized urgency and immediacy. With Dr. King's birthday on our calendar, we have finally assimilated him into our culture. More unfortunate, the holiday conveniently serves as a cosmetic to hide the true failures of policies that continue to constitute an assault on the interests of the powerless for whom Dr. King fought and died."

The white brother said it. I didn't say it. And what he said here was, we are talking about his dream, rather than doing his work.

I have just a few more things to tell you and I will sit down. You see, I have to tell it because my heart demands that I do so. A man by the name of Dr. Clayborn Carson is the director of the Martin Luther King Papers Project. The Martin Luther King Papers Project is sponsored by Stanford University.

What Dr. Clayborn Carson is doing is compiling all of the writings and speeches of Dr. King into book form. There will be 12 of those volumes and they're supposed to come out within the next ten years. Now, Dr. Carson ought to know what he's talking about when he's talking about Dr. King because he's there working with the man's papers. He ought to be an authority on the subject. What Dr. Carson says is that Dr. King's epitaph—what he says is no man's epitaph poses a threat to the power structure. Don't care what you write on a tombstone, don't care what you write as an epitaph on a tombstone, it is no threat to the injustices of those that remain alive.

So it is that Dr. Carlson says in an article appearing in Focus Magazine—I'll read that to you, just a little of it, if I may, please—

> "When Dr. King suggested his own epitaph, he wanted to be remembered for giving his life to serve others, for trying to be right on the war question, for trying to feed the hungry and clothe those who were naked, for trying to love and trying to serve humanity."
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> "Thus", Dr. Carlson continues, "My assessment of Dr. King's role in the civil rights movement is one that encourages us to recognize our present responsibility to struggle for a more just and peaceful world. The movement prompted the passage of major civil rights legislation. But, more importantly, it prompted a major transformation of values and attitude.
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> Although black struggles of the 50's and the 60's should be remembered as a setting for Dr. King's tremen-

dous achievements, the 50's and the 60's should be remembered as a setting for Dr. King's tremendous achievements, the 50's and the 60's should also be remembered most of all as a setting that brought out the best in many of us; and rather than asking God why he has not sent us another Messiah like Dr. Martin Luther King, Jr., we ought to be asking ourselves why we're not creating new social movements in which other people with potential for greatness could exercise talents of their own."

Dr. Carlson continues "Afro Americans today do not lack resources, for we're the richest assemblage of black people on this earth. What we do lack are common understanding of collective purpose for which these resources should be mobilized." Dr. Carlson goes on to say "Waiting for another Messiah is a human weakness that is unlikely to be satisfied in more than once in a millennium."

"We honor Dr. King best" he says "By remembering that Dr. King's greatness was most clearly displayed when others participated in the black movement, displayed their best qualities in the black movement, and Dr. King can be best remembered by recognizing that aspects of his greatness survive in each and every one of us."

Dr. King was vilified. You haven't seen any vilification like you're going to see in the next month. Harold Washington was chosen to run as the first black candidate for mayor of this city because he had bucked the establishment. He had no ties that bound him. He didn't have any debts to that political entity that has oppressed us. He was a Maverick and he was not beholden to anyone. And you're going to see him vilified in the next month. They're going to pull out every trick in the book. No holds barred. They're going to pull out all the stops. They're going to attempt to denigrate

him and embarrass him and to cause us to distrust him. They're going to deprecate him.

But the black leaders are our candidates and they ride on our shoulders. We can't overlook the fact that in this year, 1987, as state elections of gubernatorial and legislators in three states with large black populations—Mississippi, New Jersey and Virginia—and there are 93 cities in this nation with black mayors. 93. And in this year we elect 12 mayors in cities of populations of over 50,000—over 50,000. These candidates are riding on our shoulders.

I have to call roll. I tell you what's going on. You see, Carl Officer and Clyde Jordon are running for mayor in East St. Louis. Richard Hatcher is running for mayor in Gary, Indiana. Wilson Goode is running for Mayor in Philadelphia, Pennsylvania.

Roll call, folks. James Shark is running for Mayor of Flint, Michigan. These are just the cities of population over 50,000 with black mayors. Lawrence Crawford is running for mayor in Saginaw, Michigan, and Thurmond Miller is running for mayor of Hartford, Connecticut. Ronald Blackwood is running for mayor in Mount Vernon, New York.

Roll call, Clarence Byrd and Curt Snuck are running for mayor of Baltimore, Maryland. Harvey Knight is running for mayor of Charlotte, North Carolina. Daryl Hart is running for mayor of Macon, Georgia. Richard Arington is running for mayor of Birmingham, Alabama.

Harold Washington is running for mayor of the City of Chicago. He got here on our shoulders. You've got to decide here and now whether or not your shoulders are broad enough to carry him in another time.

Now it's not enough. It's not enough just for you to vote. It's not enough for you to say, "Well, I cast my ballot." We've got to create an atmosphere. We've got to create an aroma.

We've got to create an attitude of victory by February 24. What we must do, we must be dedicated to making certain that everybody we know goes to the polls on February 24.

And those of us who might be inclined to be traitors—you see, there are some who have slave mentalities—those of us who are inclined to be traitors, who suspect that because you are going to the secrecy of a voting booth, that you can vote for who you want to vote for, we know who you are. Be not confused about it. When the ballot comes out, we are going to count. And 100 percent. Not 99 percent of the votes cast. Not 90 percent of the votes cast. Any man south of Madison Street who casts a vote in the February 24th election who doesn't cast a vote for Harold Washington ought to be hung as those were hung in New York.

And when the man is reelected, don't put him in the category of being a traitor because he can't come and talk to you personally. Don't end up saying, "Well, I voted for him, I campaigned for him, and I can't talk to him." Don't be running down on the fifth floor looking for jobs for which you are not qualified and which he can't give you. Don't end up telling the world "I voted for him. Now I want him to give me the moon."

He rides on our shoulders and the movement. You see, we're not talking about an election. We're talking about a crusade. We're talking about a movement. We're talking about an emancipation. We're talking about lifting the mentality of—the slave mentality—off of those who still have it. And we must do that. Ralph, we've got to do it.

They say to me, "Well, Judge, why are you always running down to Push? You've got it made." My house is paid for. My children are educated. My wife does not have any charge accounts anywhere. But I'm here because Ada toted me.